

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petitions Pursuant to Section 706 of the		
Telecommunications Act of 1996)	WC Docket No. 14-115 (Wilson)
For Removal of State Barriers to)	WC Docket No. 14-116 (Chattanooga)
Broadband Investment)	
and Competition)	

COMMENTS OF DAVID COLLADO

As a concerned citizen and advocate for local community self-determination, I submit these comments in support of the petitions of the City of Wilson, North Carolina ("Wilson") and the Electric Power Board of Chattanooga, Tennessee ("EPB"). It is my intent that these comments will assist the Federal Communications Commission ("FCC") in understanding the importance of empowering local communities to deploy high-speed broadband networks, arguably the most critical infrastructure for communities to advance in today's global information economy.

My comments will focus on dispelling three myths often recited by opponents of municipal broadband networks:

Myth 1 - Municipal broadband networks are destined to fail because most have failed.

Myth 2 - Laws restricting municipal broadband provision "level the playing field."

Myth 3 - FCC preemption of municipal broadband restrictions would be unconstitutional.

The following discussion (and attachments) demonstrate that all three of these myths are false.

CONTENTS

I.	INTRODUCTION.....	2
II.	MUNICIPAL BROADBAND SUCCESSES FAR OUTNUMBER FAILURES.....	4
	A. CNS (BACONTON, CAIRO, CAMILLA, MOULTRIE, PELHAM, THOMASVILLE), GA.....	5
	B. SPANISH FORK, UT.....	6
	C. WINDOM, MN.....	7
III.	MUNICIPAL BROADBAND RESTRICTIONS <u>DO NOT</u> “LEVEL THE PLAYING FIELD.”.....	8
IV.	FCC HAS AUTHORITY TO PREEMPT MUNICIPAL BROADBAND RESTRICTIONS.....	12
V.	CONCLUSION.....	20
	APPENDIX A - MUNICIPAL BROADBAND COST SAVINGS CASE STUDIES	
	APPENDIX B - MUNICIPAL BROADBAND SUCCESS STORIES	
	APPENDIX C - OVERCOMING OBSTACLES TO MUNICIPAL BROADBAND NETWORKS	
	APPENDIX D - HIGH TIME FOR FEDERAL PREEMPTION OF MUNICIPAL BROADBAND RESTRICTIONS	

I. INTRODUCTION

I am a recent graduate of Benjamin N. Cardozo School of Law (JD, 2014) where I was fortunate to study telecommunications law under Susan Crawford. In fact, I chose Cardozo because of a speech I heard Susan give in 2011 about the “looming cable monopoly.”¹ Crawford’s warnings of decreasing competition in high-speed broadband markets were recently echoed by FCC Chairman Tom Wheeler. On September 4, 2014, Chairman Wheeler spoke to a group of entrepreneurs, saying “[a] 25 Mbps connection is fast becoming ‘table stakes’ in 21st century communications,” followed by “[a]t 25 Mbps, there is simply no competitive choice for most Americans... three-quarters of American homes have no competitive choice for the essential infrastructure for 21st century economics and democracy. Included in that is almost 20 percent who have no service at all!”² This backdrop of little or

¹ S. Crawford, “The Looming Cable Monopoly” (08/2011), Yale Law and Policy Review Inter Alia <http://goo.gl/dC3r0X>

² FCC Chairman Remarks on The Facts and Future of Broadband Competition, <http://goo.gl/mKuUzc>.

no competition for high-speed broadband services within local communities should be a central consideration in the FCC's determination of the EPB and Wilson Petitions. After all, the FCC's mandate under Section 706 is to "accelerate deployment" of "advanced telecommunications capacity" by "*removing barriers* to infrastructure investment *and by promoting competition* in the telecommunications market."³ (emphasis added).

While incumbent providers claim they face stiff competition, much of the competition they cite is directly or indirectly related to municipal networks like EPB's and Wilson's, which are demonstrating to the country what is possible when you connect entire American cities with fiber-to-the-premises broadband. Google Fiber has followed the lead of these municipalities and several incumbent providers are now following Google's lead. I encourage the Commission to strongly consider the critical role municipal networks have played in promoting competition for high-speed broadband services across the country, in cities large and small.

During the Spring semester of 2013, I wrote two papers about municipal broadband networks, laws and policy. For my telecom law course, I wrote about the many state laws restricting municipal broadband provision with a critical analysis of their underlying "level playing field" rationale. I submit the full paper as an attachment to these comments and provide key excerpts below. For a separate course, I wrote a paper about the FCC's authority under Section 706 to preempt state laws restricting municipal broadband provision. I submit the full paper as an attachment to these comments and provide key excerpts below.

I was so impacted by this research that I sought and obtained a grant to continue researching municipal broadband networks. I was particularly interested in documenting the cost savings realized by

³ Telecommunications Act of 1996 § 706(b).

local governments, schools and residents due to new capabilities and competition introduced by municipal broadband networks. My research was funded by the Institute for Local Self-Reliance (“ILSR”) and consisted of interviewing dozens of local officials responsible for building and managing municipal broadband networks. The result of this research is a series of case studies highlighting cost savings resulting from community owned networks. I submit the case studies as an attachment to these comments and provide three examples below. In the course of researching cost savings, I also came across evidence of unique benefits to local communities from municipal broadband provision which I documented in articles for the website Muninetworks.org. These articles are reproduced as an attachment.

II. MUNICIPAL BROADBAND SUCCESSES FAR OUTNUMBER FAILURES.

A common claim made by municipal broadband network opponents is that such networks have a track record of failure and, consequently, expose communities to unacceptable levels of financial risk. These claims often cite a few examples of networks which experienced some type of failure (e.g., Burlington, VT; Lafayette, LA; UTOPIA, UT) and then extrapolate those results across municipal broadband networks in general. Among the many problems with this tactic is that it ignores the fact that **there have been many more successful municipal networks than failed ones**, as I will demonstrate below. It also ignores the reality that **the number of failures remains constant compared to the ever growing number of successes**.

Municipal broadband deployments are experiencing a learning curve that is only about twenty years in the making. Some of the pioneers experienced failure while others excelled, all for various reasons. Most importantly, however, these past experiences and lessons learned inform community leaders considering new projects which significantly improves their likelihood of success going forward.

My own research demonstrates that the following 29 municipalities have been successful in deploying broadband networks: Austin, TX; Baconton, GA; Bristol, VA; Cairo, GA; Camilla, GA; Cedar Falls, IA; Chattanooga, TN; Danville, VA; Gainesville, FL; Glasgow, KY; Independence, OR; Indianola, IA; Lakeland, FL; Martinsville, VA; Medina County, OH; Monmouth, OR; Monroe, GA; Morristown, TN; Moultrie, GA; Palm Coast, FL; Pelham, GA; Shafter, CA; Spanish Fork, UT; Springfield, MO; Thomasville, GA; Tullahoma, TN; Wadsworth, OH; Wilson, NC; Windom, MN. This is on top of dozens of other successful municipal networks cited by other commenters to the EPB and Wilson Petitions. Together, these success stories far outnumber the relatively small number of municipal networks which have experienced some type of failure (some of which have turned the corner towards long-term success).

Success here is defined as generating cost savings for the community while delivering advanced communications services previously unobtainable (cost effectively), all while staying substantially within the financial plan adopted by local elected officials. As the case studies in Appendix A and the success stories in Appendix B demonstrate, these municipalities have generated millions of dollars in savings for local government, schools, businesses and residents. Below are a few highlights.

A. CNS (BACONTON, CAIRO, CAMILLA, MOULTRIE, PELHAM, THOMASVILLE), GEORGIA

Community Network Services (CNS) was formed by several towns in southwest Georgia who joined forces in 2000 to bring advanced communications to their rural communities. Like many community networks, it started as an effort to connect schools, libraries and hospitals, and then grew to serve businesses and residents across 3,000 rural square miles.

One of CNS's highlights is the way it has enhanced educational opportunities in some of Georgia's most remote rural communities. The high-speed network allows students to interact with

research scientists and medical instructors to provide educational opportunities otherwise unavailable.

Serving public and private customers in four counties and six towns, CNS generates massive cost savings for multiple communities. Thanks to steady profits from CNS, Thomasville, the largest town served by the network, reduced its city fire tax rate to zero.⁴ The result is \$5.2-million savings for property owners since the fire tax began phasing out in 2010. Thomasville's Mayor, Max Beverly, stated “Without the City's enterprise funds like Electric and CNS, we would not have been able to meet this goal.”

In total, CNS serves 68 public buildings, 65 schools, 1,400 businesses and 12,500 residences. All of these accounts save money, with the biggest savings going to the heaviest users like government departments. CNS's residential customers also enjoy savings between 10 and 25 percent, compared with the state average, depending on how services are bundled.

B. SPANISH FORK, UTAH

Spanish Fork, Utah, has a population of 34,000 and is located near Provo and Orem. Spanish Fork Community Network (SFCN) started providing internet and video services on a retail basis in 2001. The network has been profitable since 2005 and will finish paying its 15-year bonds in 2015.

After the final bond payment in 2015, the City of Spanish Fork and its public utilities will own the SFCN network outright. This means the city will save hundreds of thousands of dollars per year, on top of what it's already saving, by not purchasing network services from a private provider.

Furthermore, SFCN currently generates \$1-million in annual revenue for the City,⁵ which will grow to more than \$1.5-million after 2015.

⁴ D. Collado, “Thomasville Removes Local Tax, Citing Strong Broadband Revenues” (11/20/13), Muninetworks.org, <http://goo.gl/c4gGS0>, reproduced in Appendix B.

⁵ L. Gonzalez, “Utah's Spanish Fork City Network an Incredible Success” (12/14/12), Muninetworks.org, <http://goo.gl/EkwTxa>.

SFCN serves 14 schools in Nebo School District with dark fiber at an average monthly cost of \$200, far below incumbent rates. For many years, the schools actually paid only \$125 per month, but the schools voluntarily increased their payments “closer to \$200” because they felt they were underpaying. In any event, the result is hundreds of thousands in annual savings for the schools.

SFCN’s low business and residential prices, about \$30 lower than the competition on average, generate close to \$2.5-million in annual savings for its 7,150 private customers. Phone service is another large source of savings for the community, amounting to \$400,000 in yearly savings for subscribers. SFCN is so popular in the local community that it has an 80% market share of residential subscriptions.

C. WINDOM, MINNESOTA

Windom is a small town of around 4,500 people in the southwest corner of Minnesota. The City built a fiber-to-the-home network, Windomnet, in 2005 after it became clear incumbent providers were not willing to upgrade outdated services in the area. Building a fiber network for such a small population is a difficult economic proposition, but Windomnet has been successful, achieving positive cash flow in 2012.

Windomnet connects the City’s administration buildings, libraries and city services like fire and police, all free of charge. This saves the City hundreds of thousands of dollars every year, freeing up scarce budget resources for other needs. Windomnet also provides free fiber access to the school district which translates into even more savings for the community. The savings are not just in the cost of bandwidth, but also in new efficiencies like online training and video conferencing the schools’ old network couldn’t support.

Windomnet has also had a direct effect on local employment. The multinational outdoor equipment maker, Toro Corporation, employs 700 people in Windom. And Windomnet has helped it

grow from a single manufacturing plant in the area to six additional locations. Fortune Trucking, which monitors fuel prices along nationwide trucking routes for dispatching, was about to move out of Windom after a national provider failed to deliver connectivity to a location that Fortune had already invested in building. Windomnet stepped in and completed Fortune's network in four weeks, keeping the company and its employees in town.

III. MUNICIPAL BROADBAND RESTRICTIONS DO NOT “LEVEL THE PLAYING FIELD.”

The “level playing field” rhetoric used by proponents of state laws restricting municipal broadband networks is extremely misleading. In reality, the proverbial playing field, without these laws, is naturally tilted in favor of the billion-dollar incumbent providers who lobbied so hard for these laws.⁶ These laws simply tilt the playing field even further in favor of incumbents. This should surprise nobody as many of these laws were drafted by incumbents, either directly or through the American Legislative Exchange Council (ALEC).⁷

Below is an excerpt from a paper I wrote titled “Overcoming Obstacles to Municipal Fiber Networks” during the Spring 2013 semester for my telecommunications law course at Benjamin N. Cardozo School of Law. The full paper (unpublished) is attached as Appendix C.

⁶ Much has been written about the well-funded lobbying efforts by incumbent providers to pass state laws restricting municipal broadband provision. For a few examples, see Brendan Greeley and Alison Fitzgerald, Psst... Wanna Buy A Law, Bloomberg Businessweek (12/11/2011), available at <http://goo.gl/P1FbzH>, and Christopher Mitchell and Todd O'Boyle, The Empire Lobbies Back: How National Cable and DSL Companies Banned the Competition in North Carolina, Institute for Local Self-Reliance and Common Cause (January, 2013), available at <http://goo.gl/XmbIYM>.

⁷ See Brendan Fischer, “How ALEC Helps Big Telecom Change State Laws for Corporate Gain” (February 13, 2014) The Center for Media and Democracy, PRWatch, available at <http://goo.gl/JhCdAG>.

3.E.iii. Leveling the Playing Field

Perhaps the criticism raised most often against municipal broadband... is that municipalities enjoy a number of unfair advantages when competing against private firms. Rhetoric calling for a “level playing field” between municipal and private broadband providers is often used.⁸ More specifically, opponents of municipal broadband assert that local governments can unfairly cross-subsidize networks with revenues from other municipal utilities (i.e., gas, power, water) and they enjoy unfair tax advantages over private providers.⁹ Furthermore, opponents contend that municipalities should not be able to play the roles of competitor and regulator simultaneously, lest they give themselves unfair competitive advantages.¹⁰ These arguments raise valid issues which deserve thorough consideration.

But first, it is worth noting that federal antitrust laws and Section 253 of the Telecommunications Act forbid the type of unfair competition that municipal broadband opponents claim as a threat. Section 253(a) reads: “[n]o 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.”¹¹ Section 253(c) further mandates local governments to manage public rights-of-way and other regulatory authority “on a competitively neutral and nondiscriminatory basis.”¹² And while municipalities are immune to money damages in antitrust suits under the Local Government Antitrust Act of 1984, they are still subject to injunctive antitrust remedies.¹³ These sources of legal authority and liability should inform the question of whether municipalities in fact wield unfair advantages over private competitors.

3.E.iii.a. Cross-subsidies

Private providers complain that it would be unfair for them to compete with municipalities that cross-subsidize their broadband networks with income from other municipal utilities.¹⁴...

These arguments ignore several key facts. First of all, private companies like Comcast and Time Warner Cable are free to cross-subsidize on an interstate level, and often do. In fact, Comcast’s growth

⁸ <http://muninetworks.org/content/level-playing-field-0>

⁹ Kathryn Tongue, *Municipal Entry Into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 *Nw. U. L. Rev.* 1099, 1112

¹⁰ *Id.*

¹¹ 47 USC 253(a).

¹² 47 USC 253(c).

¹³ 15 U.S.C. §§ 34-36.

¹⁴ Cite prelude to ALEC model telecom bill

from a single Mississippi cable system purchased in 1963 into a \$100-billion national cable company is due largely to its use of income from earlier acquired networks to subsidize the building of new ones.¹⁵ This practice is a form of cross-subsidization. What's more, these private firms can tap into revenue streams from captured markets where they enjoy monopoly pricing power to subsidize the costs of new networks or to lower prices in markets where they face competition. Another key fact is that the infrastructure used by incumbent phone and cable companies is often years or decades old, meaning its cost has already amortized substantially or completely.¹⁶ Consequently, the costs of providing broadband service for these firms come mostly from relatively inexpensive incremental upgrades and maintenance costs. As a result, these private firms enjoy massive profit margins, on the order of 80-90%, which generate large cash reserves that can be used to cross-subsidize other markets.¹⁷

Cross-subsidies are criticized more generally as promoting economic inefficiencies by encouraging misalignment of costs and benefits. If revenues from one service are allowed to support another service which would otherwise create economic loss, inefficiencies will be perpetuated to the detriment of optimal market equilibrium. Applying the inefficiency argument to broadband markets, however, requires a fair assessment of *all relevant costs and benefits*, not only those which easily translate into dollars. As discussed in Section 3.B, there is more to calculating value from a broadband network than subscriber revenues. Positive externalities, or spillovers, from local improvements in educational opportunities, increased entrepreneurial activity, and access to healthcare and public services all contribute to the real value of a broadband network.¹⁸ Accordingly, allegations of market inefficiency which ignore such factors are misguided.

3.E.iii.b.. Unfair Tax Burdens

Another “level playing field” argument points to disparate tax burdens. Federal, state and local

¹⁵ Susan Crawford, *Captive Audience*, Chapter 3.

¹⁶ Amortization is the accounting process a company uses to account for the cost of an asset over time in order to more accurately reflect its contribution to revenue. Over time, the company assigns less cost to its fixed assets - infrastructure in this case - which results in greater profit margins for the same service.

¹⁷ Adam Lynn, *Cable Companies' Big Internet Swindle*, Free Press (November 24, 2009) (“Some financial analysts and institutions have noted that the profit margin for cable Internet subscribers is on the order of 80 percent.”); See also David Talbot, *When Will the Rest of Us Get Google Fiber?*, Technology Review (February 4, 2014) (“The cable distribution giants like Time Warner Cable and Comcast are already making a 97 percent margin on their “almost comically profitable” Internet services, according to Craig Moffet, an analyst at the Wall Street firm Bernstein Research.”).

¹⁸ Cite pages in Frischmann, *Infrastructure*, where he discusses valuing spillovers, and <http://goo.gl/612iio>.

tax laws often exempt municipal governments which are usually incorporated as nonprofit entities.¹⁹ Some complain that this allows municipalities to charge lower prices because they enjoy a lower tax burden than their private competitors.²⁰

However, this line of argument neglects the fact that municipal utilities make what are called payments in lieu of taxes, or PILOTs, which can amount to larger sums than the taxes paid by similarly situated private competitors. A study comparing municipal power utilities to private counterparts showed that in 2010, the public utilities contributed 33% more to local governments in taxes, tax equivalents and other payments.²¹ For a broadband example, between 2008 and 2010, Burlington Telecom, a municipal broadband provider marred by mismanagement, still paid the City of Burlington \$500,000 more in PILOTs than the two incumbent providers, Comcast and Fairpoint, paid in combined taxes.²²

Other key considerations in comparing tax burdens are corporate tax credits, accelerated depreciation, and other tax write-offs which can add up to billions in tax savings for large corporations like AT&T and Comcast. In fact, instead of paying taxes in 2011, AT&T received a \$420-million refund.²³

3.E.iii.c. Competitor, Regulator, or Both?

Another major criticism against municipal broadband is the potential for municipalities to abuse their position as a regulator to gain competitive advantages, specifically with respect to franchise fees and access to public rights-of-way.²⁴ A city might charge a competitor franchise fees, the argument goes, while exempting itself from the same, thereby attaining a competitive cost advantage. A city might gain a similar cost advantage by charging a private competitor fees to access public rights-of-way.

Such possibilities, however, exist more in theory than reality. Both antitrust law and Section 253 of the Telecommunications Act offer redress to private companies who feel unfairly treated by abuses of municipal power. Aware of these potential liabilities and averse to the costs of litigation, municipalities

¹⁹ Tongue, supra Note 108.

²⁰ Id.

²¹ American Public Power Association, Payments and Contributions by Public Power Distribution Systems to State and Local Governments, 2010 Data, available at <http://www.publicpower.org/files/PDFs/PilotReport2010.pdf>.

²² Christopher Mitchell, Learning From Burlington Telecom: Some Lessons for Community Networks, New Rules Project (August 2011).

²³ <http://www.dslreports.com/shownews/ATT-Paid-No-Federal-Taxes-in-2011-Saw-420-Million-Refund-120912>

²⁴ Tongue, supra Note 108.

often self-impose comparable fees when competing with private firms.

IV. FCC HAS AUTHORITY TO PREEMPT MUNICIPAL BROADBAND RESTRICTIONS

FCC preemption of municipal broadband restrictions would be a constitutional exercise of the Commission’s ancillary Title I jurisdiction, anchored by its Section 706 mandate to remove barriers obstructing advanced communications deployment. I wrote a paper on this topic titled “High Time for Federal Preemption of Municipal Broadband Restrictions” during my Spring 2013 semester at Cardozo. Below is an excerpt from the paper with the bulk of the legal analysis. The entire paper (unpublished) is attached as Appendix D.

3.B. Existing FCC Powers

That the FCC already has authority via the Telecommunications Act to preempt municipal broadband restrictions is not a new idea. It was artfully advanced by Matthew Dunne in *Let My People Go (Online): The Power of the FCC to Preempt State Laws That Prohibit Municipal Broadband*, published in *Columbia Law Review* in 2007.²⁵ I will expand on Dunne’s analysis in light of recent FCC reports and case law, demonstrating it is more evident today than ever before that the FCC can and should preempt municipal broadband restrictions.

At the time of Dunne’s writing (2007), four consecutive FCC Broadband Progress Reports had concluded that U.S. broadband deployment was proceeding in a timely reasonable fashion.²⁶ This is no longer the case. Starting with the sixth edition of the report, issued in 2010, the FCC has reached the opposite conclusion three times in a row - broadband deployment in the U.S. is not reasonable and timely.²⁷ Hence, the case is much stronger today for a need to preempt state laws restricting municipal broadband provision.

Also since Dunne’s 2007 paper, case law interpreting the FCC’s ancillary jurisdiction over ISPs

²⁵ Matthew Dunne, *Columbia Law Review*, Vol. 107, No. 5 (Jun., 2007), pp. 1126-1163

²⁶ Cite

²⁷

has developed. Despite such authority being denied in *Comcast v. FCC* (D.C. Cir. 2010) and likely to be denied in *Verizon v. FCC* (currently pending before the D.C. Circuit), I will argue the case for FCC ancillary jurisdiction to preempt municipal broadband restrictions is distinguishable from those cases and still supported by Supreme Court and D.C. Circuit case law.

3.B.i. Title I - Ancillary Jurisdiction

Title I of the Act, which created the Federal Communications Commission, mandates the FCC to regulate “interstate and foreign commerce in communication by wire and radio so as to make available... to all the people of the United States, without discrimination... a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.”²⁸ Broadband Internet access clearly consists of communication by wire (i.e., cable, copper, fiber) and radio (i.e., cellular networks, WiFi, WiMax). So a credible argument exists that Title I grants the FCC authority to regulate broadband. Lending credence to this argument is Section 4 of the Act, which authorizes the FCC to “perform *any and all acts*, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”²⁹ (emphasis added)

The Supreme Court, however, has interpreted Title I authority as ancillary to other affirmative powers granted by the Act. In other words, Title I does not constitute an independent source of power; it can only be asserted by the FCC to the extent necessary to meet other responsibilities mandated by the Act. This view was articulated by the Court in *United States v. Southwestern Cable*, which addressed the FCC’s assertion of “broad authority” under Title I to regulate cable companies for the purpose of protecting television broadcasters.³⁰ Agreeing with the FCC, the Court held that the Commission could regulate cable providers to the extent such rules were “reasonably ancillary to the effective performance of the Commission’s various responsibilities for the regulation of television broadcasting.” Checking this newly recognized ancillary power, the Court ruled against the Commission in *FCC v. Midwest Video Corp.*³¹ *Midwest Video* dealt with FCC rules mandating cable providers

²⁸ 47 U.S.C. § 151

²⁹ Benjamin, note 32 supra at 754.

³⁰ 392 U.S. 157 (1968). Also note that *Southwestern Cable* occurred before Congress added Title VI to the Act in 1984, granting the FCC affirmative power to regulate cable providers. The FCC claimed the regulations were necessary to protect television broadcasters from the market effects of unregulated explosive growth of cable.

³¹ 440 U.S. 689 (1979).

carry “public access” channels. The Court ruled the regulations were not “reasonably ancillary” to the Commission’s powers over broadcasting because the Act specifically prohibited common carriage regulation of broadcasters. If the FCC could not promulgate common carriage regulations on broadcasters, doing so on cable providers could not be “reasonably ancillary” to its powers over broadcasting. The Supreme Court synthesized these holdings in *American Library Ass’n v. FCC*, declaring two conditions must be met for the Commission to exercise its ancillary jurisdiction: “(1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.”³²

...

Notwithstanding the fate of FCC ancillary authority to promulgate net neutrality rules, the case for FCC ancillary authority to preempt municipal broadband restrictions is strong. As Dunne synthesized in *Let My People Go (Online)*, “[c]ourts have most often upheld [ancillary jurisdiction] *closely related* to explicit grants of authority to regulate the communications infrastructure... and struck down uses that moved farther away from these explicit grants...”³³ (emphasis added). As I will elaborate below, preempting state laws restricting municipal broadband *precisely* serves the Commission’s Section 706 mandate to accelerate deployment of advanced communications infrastructure. Accordingly, courts should uphold FCC ancillary jurisdiction, anchored by Section 706, to preempt municipal broadband restrictions.

3.B.ii. Section 706 - Advanced Communications

Section 706 mandates the FCC to “take immediate action to accelerate deployment” of “advanced telecommunications capacity” by “removing barriers to infrastructure investment and by promoting competition in the telecommunications market” when it determines “advanced telecommunications capability is [not] being deployed to all Americans in a reasonable and timely fashion.”³⁴ Among the powers specifically granted the FCC to accelerate deployment are “measures that *promote competition in the local telecommunications market, or other regulating methods* that remove barriers to infrastructure investment” as long as they are exercised “in a manner consistent

³² 406 F.3d 689, 691 (D.C. Cir. 2005).

³³ Dunne note 68 supra at 1144.

³⁴ *Id.*

with the public interest, convenience, and necessity.”³⁵ (emphasis added). These broadly worded provisions are consistent with the general purpose of the Act: “[t]o *promote competition* and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies.*”³⁶ (emphasis added). Accordingly, a broad interpretation of the statutory language appears justified in order to achieve the Act’s general purpose, including preempting state laws which undermine the Act’s purpose.

Under the preceding broad interpretation of Section 706, the FCC need only determine that broadband infrastructure is not being “deployed to all Americans in a reasonable and timely fashion” before preempting state laws which undermine its 706 mandate. Section 706(b) commands the FCC to employ a notice of inquiry to determine the extent of broadband deployment throughout the country.³⁷ Accordingly, the Commission releases a regular Broadband Progress Report every one to two years.³⁸ The first five reports concluded that broadband services were being deployed to all Americans in a timely fashion.”³⁹ The last three reports, beginning in 2010, conclude the opposite - broadband deployment is not reasonable and timely.⁴⁰ It follows that the FCC can and should use the full extent of its powers under the Act to “take immediate action to accelerate deployment” of “advanced telecommunications capacity” across the country.

The measures taken by the FCC thus far to meet its Section 706 mandate have been mostly ineffective. Since 2010, the FCC has tried to reform its universal service subsidy program and launched new programs focused on deploying broadband to schools.⁴¹ With these funds going mostly to

³⁵ 1996 Act § 706(a).

³⁶ 1996 Act prelude.

³⁷ 1996 Act § 706(b).

³⁸ Archive of FCC Broadband Progress Reports available at http://www.fcc.gov/reports?filter_terms%5B%5D=237.

³⁹ FCC, Fifth Broadband Progress Report (June 12, 2008) (“The FCC today adopted a report showing that broadband services are currently being deployed to all Americans in a reasonable and timely fashion.”); Fourth Broadband Progress Report (September 9, 2004) (“*Consistent with prior reports*, [the Commission] concludes that the overall goal of section 706 is being met, and that advanced telecommunications capability is being deployed on a reasonable and timely basis to all Americans.”) (emphasis added).

⁴⁰ See *supra* Note 5.

⁴¹ FCC, Seventh Broadband Progress Report (2011) (“Since first finding in the 2010 Report to Congress that deployment is not reasonable and timely, the FCC has taken a number of steps to accelerate national broadband deployment and adoption. These actions include reforming the E-rate program to enable schools and libraries to get higher-capacity, lower-cost access to the Internet; launching its “Learning On-the-Go” pilot program at schools and libraries across the country to advance the use of digital textbooks and mobile Internet access for interactive learning outside the classroom; launching a Broadband Acceleration Initiative to remove barriers and speed deployment of

incumbent firms to compel them to serve areas they would not serve otherwise, little has been done to “promote competition” in monopolized or near-monopolized markets.⁴² The FCC has also auctioned off new spectrum to expand wireless broadband and streamlined procedures for building and upgrading cell towers.⁴³ This focus on wireless infrastructure has resulted in remarkable progress for wireless broadband access in America, while wireline broadband continues to lag.⁴⁴ For this reason, I argue it is time for the FCC to leverage its Section 706 mandate to more directly promote competition and accelerate deployment of advanced communications infrastructure. As discussed above in Part 2.B, municipal broadband provision presents a promising approach to meeting both of these objectives, so legal barriers to municipal broadband must be eliminated.

Further clarity on Section 706 should come from the resolution of *Verizon v. FCC*. Among the various sections of the Act relied on by the Commission in its Open Internet Order, 706 is central. Some doubt this approach will work because the D.C. Circuit essentially foreclosed the FCC from relying on Section 706 to support ancillary jurisdiction based on the Commission’s previous statement in a 1999 order, “[S]ection 706(a) does not constitute an independent grant of forbearance authority *or of authority to employ other regulating methods*.”⁴⁵ (emphasis in original). While the Commission has tried to backtrack from this statement in the 2010 Open Internet Order,⁴⁶ it is unlikely to overcome the D.C. Circuit’s observation in *Comcast*, “[b]ecause the Commission has never questioned... that understanding of section 706, and because agencies ‘may not ... depart from a prior policy *sub silentio*’... the Commission remains bound by its earlier conclusion that section 706 grants no regulatory authority.”⁴⁷ What this holding signals, however, is that the FCC can revise its interpretation of Section 706 through a formal notice-and-comment rulemaking, a procedure the Commission must already engage before preempting state laws.

3.B.iii. Exercising Preemption Power Under Section 706

robust, affordable broadband; moving to reform the Universal Service Fund and intercarrier compensation system to better incentivize deployment of broadband to underserved communities; and unleashing additional spectrum for broadband.”).

⁴² FCC Response to U.S. House of Representatives Committee on Energy and Commerce Universal Service Fund Data Request of July 9, 2012 - Top Ten Recipients of High-Cost Support.

⁴³ See supra Note 40.

⁴⁴ FCC, Eighth Broadband Progress Report (2012) (citing “World-leading LTE deployment by mobile operators” while still finding “broadband is not yet being deployed in a reasonable and timely fashion.”).

⁴⁵ *Comcast* Note 77 supra at 659.

⁴⁶ Open Internet Order Para. 117-123.

⁴⁷ See Note 98 supra.

Should the FCC decide to employ its Section 706 powers to preempt state laws restricting municipal broadband, the Commission would first need to conduct a public notice-and-comment rulemaking.⁴⁸ The rulemaking process would be used to gather comments about the FCC’s proposal to preempt such laws. The Commission would then deliberate on the comments submitted and issue a final Report and Order (R&O). As long as the resulting regulation is reasonable in light of the record collected through the notice-and-comment period and other evidence, the resulting order should receive *Chevron* deference by the courts.⁴⁹

Based on the evidence discussed in Parts 1 and 2 above, an FCC order preempting state laws restricting municipal broadband would be reasonable, especially if the order addressed opponents’ concerns about potential anticompetitive behavior by municipalities. Such an order would make clear that municipalities may offer broadband services as long as they compete fairly with private providers, taking all competitive realities (i.e., cross-subsidies, taxes, regulations) into consideration.

3.B.iv. Section 253 Preemption Power

While Title I ancillary jurisdiction, anchored by Section 706, should be sufficient to support FCC preemption of municipal broadband restrictions, neither section expressly mentions preemption power. Section 253, however, is specifically about preempting state laws restricting telecommunications services. Unfortunately, the applicability of Section 253 to municipal broadband is doubtful after the Supreme Court’s decision in *Nixon v. Missouri Municipal League* as I will discuss below.⁵⁰

Section 253, titled “Removal of Barriers to Entry,” opens “[n]o 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.”⁵¹ Section 253 further provides “[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)... *the Commission shall preempt* the enforcement of such statute,

⁴⁸ See prelude to § 253(d), note 72 supra.

⁴⁹ In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that courts should defer to agency interpretations of statutes mandating agency action unless they are unreasonable. Also see *City of Arlington v. FCC* (Slip Op. No. 11–1545, May 20, 2013) for the most recent Supreme Court ruling explaining the scope of *Chevron* deference to FCC rulemakings.

⁵⁰ 541 U.S. 125 (2004).

⁵¹ 47 U.S.C. 253(a).

regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.”⁵² (emphasis added). At first glance, it appears Section 253 single-handedly grants the FCC all the power it needs to preempt municipal broadband restrictions without resorting to ancillary jurisdiction. In light of Supreme Court precedent, however, it is doubtful.

In *Missouri Municipal League*, the Supreme Court ruled that “any entity” in 253(a) did not include municipalities. Perhaps making the case easier to decide, the case involved a refusal by the FCC to preempt a Missouri law which prohibited municipalities from providing telephone service. A group of Missouri municipalities had petitioned the FCC to preempt the law as a violation of Section 253, but the Commission refused, instead declaring the statute only covered independent entities subject to state regulation.⁵³ In upholding the FCC’s determination, the Supreme Court, as did the FCC, relied heavily on *Gregory v. Ashcroft* for the proposition “that Congress needs to be clear before it constrains traditional state authority to order its government.”⁵⁴ To further support its decision, the Court expressed concern over unintended consequences which would result if states could not regulate what are essentially extensions of themselves (i.e., political subdivisions).⁵⁵

In *Let My People Go (Online)*, Dunne questions the *Missouri Municipal League* Court’s view of the balance between state and municipal power. In addition to citing several cases where the Court upheld federal regulatory authority to override state laws, Dunne also questions the Court’s assumption of municipal powerlessness absent affirmative grants of authority from state governments.⁵⁶ What Dunne found most troubling was the Court’s extension of *Gregory v. Ashcroft*, which dealt with an enlargement of federal power over state matter - clearly invoking federalism concerns - to a case which involved allocation of power from states to municipalities.⁵⁷ The latter, Dunne points out, is a distribution of power which appears to align with the spirit of federalism as explained by the Court in *Gregory v. Ashcroft* - “[t]his federalist structure of joint sovereigns... assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society...it allows for more innovation and experimentation in government...”⁵⁸ After all, shifting power from state to local

⁵² 47 U.S.C. 253(d).

⁵³ Note 103 supra at 129.

⁵⁴ Id.

⁵⁵ Id at 134.

⁵⁶ Dunne at 1149-1151.

⁵⁷ Dunne at 1150-1151.

⁵⁸ 501 U.S. 452, 458 (1991).

governments moves power closer to the people, which is the ultimate goal of federalism. Dunne concludes “the majority holding in *Missouri Municipal League* is based on mistaken notions of municipal powerlessness and unexamined intuitions about the best means to promote the values of federalism. The Court would be wise to hesitate before applying this precedent more widely.”⁵⁹

Dunne’s analysis aside, it is unclear whether *Missouri Municipal League* has any impact on the FCC’s power to preempt state laws restricting municipal broadband provision. For one, that case dealt with municipal *telecommunications* service (i.e. telephone), not broadband. Second, *Brand X*, as discussed above, upheld the FCC’s classification of broadband as an “information service” and not a “telecommunications service,” further calling into question the relevance of *Missouri Municipal League* and Section 253 over broadband.⁶⁰ Another interesting point is that the FCC actively declined to apply Section 253 to municipal telecommunications in *Missouri Municipal League*, yet it is currently on the record, at least its Chairman is, against state laws restricting municipal broadband.⁶¹

Due to these significant questions surrounding Section 253, I believe the FCC should proceed with preempting municipal broadband restrictions under Title I and Section 706, after a full notice-and-comment procedure of course. As I will discuss below, the Commission should simultaneously lobby Congress for new legislation clarifying that Section 253 constitutes an affirmative grant of power to the FCC for the purpose of preempting state laws restricting municipal broadband.

V. CONCLUSION

The EPB and Wilson Petitions should be granted because municipalities are best suited to serve local needs, and affordable high-speed broadband is a necessity. State laws restricting municipal broadband provision directly undermine the FCC’s mandate under Section 706 to ensure high-speed broadband networks reach all Americans in a timely manner. Therefore the Commission can and should use its Title I and Section 706 powers to preempt such laws and empower municipalities to create the

⁵⁹ Dunne at 1151.

⁶⁰ Recall Section 253 specifically refers to “telecommunications service” as opposed to Section 706 which more specifically covers “advanced telecommunications capacity.”

⁶¹ See Note 3 *supra*.

competition for broadband services their people deserve.