



Comments of

International Center for Law and Economics¹

Geoffrey Manne, Executive Director

Ben Sperry, Associate Director

&

TechFreedom²

Berin Szoka, President

Tom Struble, Legal Fellow

In the Matter of

*Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions,
Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws
Restricting the Deployment of Certain Broadband Networks*

WCB Docket Nos. 14-115 and 14-116

August 29, 2014

¹ Geoffrey A. Manne is the founder and Executive Director of the nonprofit, nonpartisan International Center for Law and Economics (ICLE), based in Portland, Oregon. He is also Senior Fellow at TechFreedom. He can be reached at gmanne@laweconcenter.org. Ben Sperry is ICLE's Associate Director. He can be reached at bsperry@laweconcenter.org.

² Berin Szoka is President of TechFreedom, a nonprofit, nonpartisan technology policy think tank. He can be reached at bszoka@techfreedom.org. Tom Struble is a Legal Fellow at TechFreedom. He can be reached at tstruble@techfreedom.org.

I.	Introduction & Summary.....	3
II.	The Commission Lacks Authority to Intrude Upon the Sovereignty of the States in this Case	4
	A. Section 706 Does Not Provide Sufficient Legal Authority to Sustain a Claim of Field Preemption.....	5
	B. Whatever Authority Section 706 May Grant, the State Laws in Question Can Be Enforced Concurrently, and Do Not Clearly Frustrate its Purpose, So There Can Be No Conflict Preemption Either	7
III.	The FCC’s Power to Preempt Would Be a Double-Edged Sword.....	10
IV.	Government-Run Broadband is Just “Groping in the Dark”	12
	A. Giving Government Greater Control over Broadband Is a Dangerous Idea	13
	B. Government-Owned Networks Have a Poor Track Record of Serving Consumers.....	14
	1. Greenlight – Wilson, NC	15
	2. Electric Power Board – Chattanooga, TN	18
	3. Other Examples.....	19
V.	This Proceeding is a Polarizing Distraction from Actually Promoting Broadband Deployment	21
	A. There’s No Economic Basis for Artificially Promoting Gigabit Fiber	23
VI.	Government Subsidization and Ownership of Broadband Deters Private Broadband Deployment and Competition, thus Violating Section 706	25
	A. Overall broadband deployment is adversely affected by municipal broadband.	26
	B. Competition is adversely affected by municipal broadband.....	30
VII.	If the FCC Preempts, It Should Make Clear that Preemption Would Not Apply to Laws Mandating Open Access for Government-Owned Networks	31

I. Introduction & Summary

On July 24th, 2014, the Electric Power Board (EPB) of Chattanooga, Tennessee, and the City of Wilson, North Carolina, filed separate petitions with the Federal Communications Commission (“FCC” or “Commission”), each asking the FCC to use the authority the FCC has claimed under Section 706 of the Telecommunications Act of 1996³ to preempt state laws in Tennessee and North Carolina restricting the deployment of municipally-owned broadband networks.⁴ Just four days later, the Commission released a Public Notice⁵ establishing the current comment cycle, giving interested parties scantily over a month’s time to review and respond to the complex and voluminous petitions, despite the litany of other important and intricate issues currently before the FCC.⁶

TechFreedom, ICLE, and seven other organizations — many of which are small operations with limited resources — filed a request seeking to have the comment deadline in this proceeding

³ Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (1996), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (Codified as amended at 47 U.S.C. § 1302).

⁴ See Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by Electric Power Board, Chattanooga, Tennessee, WC Docket No. 14-116 (filed July 24, 2014) [“EPB Petition”], available at <https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf>; Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition, filed by City of Wilson, North Carolina, WC Docket No. 14-115 (filed July 24, 2014) [“Wilson Petition”], available at <http://www.baller.com/pdfs/wilson706petition.pdf>.

⁵ Pleading Cycle Established for Comments on Electric Power Board & City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, *Public Notice*, WCB Docket Nos. 14-115 & 14-116 (July 28, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-1072A1.pdf.

⁶ See, e.g., Protecting and Promoting the Open Internet, *Notice of Proposed Rulemaking*, GN Docket No. 14-28 (May 15, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-61A1.pdf (reply comments due September 10th); Commission Seeks Comment on Applications of Comcast Corporation, Time Warner Cable Inc., Charter Communications, Inc., & Spinco to Assign & Transfer Control of FCC Licenses & Other Authorizations, *Public Notice*, MB Docket No. 14-57 (July 10, 2014), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-14-986A1.pdf (Comments/Petitions due August 25th, and Responses to Comments/Oppositions to Petitions due September 23rd); Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, *Tenth Broadband Progress Notice of Inquiry*, GN Docket No. 14-126 (Aug. 1, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0805/FCC-14-113A1.pdf (comments due September 4th and reply comments due September 19th); Commission Seeks Comment on Applications of AT&T Inc. & DirecTV to Transfer Control of FCC Licenses & Other Authorizations, *Public Notice*, MB Docket No. 14-90 (Aug. 7, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0807/DA-14-1129A1.pdf (comments/petitions due September 16th).

extended,⁷ but this request was summarily denied.⁸ Thus, due to time and resource constraints, the following comments will not address each and every point raised by the two petitions. Rather, these comments will address a few discrete points — including (1) the legal authority for Federal preemption in this case, and (2) the policy implications raised by the two petitions — before offering some general advice to the Commission: Deny the petitions of EPB and Wilson; issue a Notice of Inquiry to gather further data on the efficacy of government-run broadband networks; and, in the meantime, focus on broadband deployment initiatives that have gathered more consensus (*e.g.*, promoting “Dig Once” policies, extending pole-attachment rights to broadband-only providers, and encouraging intermodal facilities-based competition, such as by maximizing the reallocation of spectrum for wireless broadband). We also note the unique dangers posed by increasing control over broadband, particularly in terms of censorship, surveillance, and other kinds of privacy invasions.

II. The Commission Lacks Authority to Intrude Upon the Sovereignty of the States in this Case

Principles of federalism have been engrained in the legal history of the United States for hundreds of years, and can be traced directly to two separate provisions of the Constitution: the Supremacy Clause⁹ and the Tenth Amendment.¹⁰ The Supremacy Clause dictates that Federal laws “shall be the supreme law of the land[.]”¹¹ while the 10th Amendment provides that any powers not granted to the Federal government by the Constitution shall be “reserved to the states respectively, or to the people.”¹²

The relationship between these two Constitutional provisions has been sussed out by the courts over the years, and has essentially taken two forms: field preemption, and conflict preemption. With field preemption, Federal laws will be deemed to preempt and supplant any

⁷ TechFreedom, et al., *Re: Filing Deadline Extension Request*; 47 C.F.R. § 1.46(b), WCB Docket Nos. 14-115 & 14-116 (Aug. 20, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521784261> (asking for a one-month extension to the comment filing deadline).

⁸ Petition of the City of Wilson, North Carolina, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment & Competition; Petition of the Electric Power Board of Chattanooga, Tennessee, Pursuant to Section 706 of the Telecommunications Act of 1996, for Removal of Barriers to Broadband Investment & Competition, *Order*, WC Docket Nos. 14-115 & 14-116 (Aug. 27, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0827/DA-14-1246A1.pdf (denying the request for extension).

⁹ U.S. Const. art. VI, cl. 2.

¹⁰ U.S. Const. amend. X.

¹¹ U.S. Const. art. VI, cl. 2.

¹² U.S. Const. amend. X.

related state laws if the text of the Federal laws clearly indicate that Congress intended Federal laws to govern the entire area.¹³ However, if it is unclear whether Congress intended a Federal law to preempt the entire regulatory field, state laws will be upheld and enforced alongside the Federal law, so long as the two are not in direct conflict.¹⁴ If the laws *are* in conflict, or if the state law frustrates the purposes of the Federal law, then, by way of the Supremacy Clause, the Federal law trumps the state law.¹⁵

In the two petitions, EPB and Wilson ask the FCC to use the statutory authority the FCC has claimed it possesses under Section 706 of the Telecommunications Act of 1996 to preempt state laws in Tennessee and North Carolina, respectively, that impose certain restrictions on the build-out of government-owned broadband networks.¹⁶ The question, then, is whether Section 706 provides sufficient authority for the FCC to preempt the state laws in question, either because (a) Section 706 clearly indicates that Congress intended it to be the supreme law of the land in regards to broadband deployment, and all state laws on the topic are preempted (under the legal theory of field preemption), or (b) the laws in question directly conflict with the statutory language of Section 706, and thus the state laws cannot be enforced concurrently with the Federal law, meaning that they must be preempted (under the legal theory of conflict preemption). Each of these possibilities shall be discussed in turn, before turning to the policy implications raised by the two petitions.

A. Section 706 Does Not Provide Sufficient Legal Authority to Sustain a Claim of Field Preemption

As we recently explained in our comments on the FCC's Open Internet Notice of Proposed Rulemaking (attached here in relevant part as Appendix A), we believe that Congress intended Section 706 to be a command to the FCC to use powers granted elsewhere in the act to promote broadband deployment, and is not in itself an independent grant of authority.¹⁷ Rather, Section 706 is a *constraint* upon the FCC, a requirement that the FCC give special

¹³ See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 507-08 (1996) (“[O]rdinary principles of ‘conflict’ and ‘field’ preemption . . . make clear that a federal requirement pre-empts a state requirement if (1) the state requirement actually conflicts with the federal requirement — either because compliance with both is impossible, or because the state requirement ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ — or (2) the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”) (internal citations omitted).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See EPB Petition, at 1; Wilson Petition, at 2.

¹⁷ See Protecting & Promoting the Open Internet, *TechFreedom & ICLE Legal Comments*, GN Docket No. 14-28, at 62-91 (July 17, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521706235>.

weight to the goal of maximizing broadband deployment, and a hook for outside parties to *compel* the FCC to pursue that goal through a judicial petition for *mandamus*, should the FCC fail to do so.¹⁸ This is consistent with the FCC's original 1998 interpretation of Section 706, and we believe it is the only one the statute will bear:

After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706(a) does not constitute an independent grant of forbearance authority **or of authority to employ other regulating methods**. Rather, we conclude that **section 706(a) directs the Commission to use the authority granted in other provisions**, including the forbearance authority under section 10(a), to encourage the deployment of advanced services.¹⁹

It is true that in the past year the D.C. Circuit and Tenth Circuit have concluded otherwise.²⁰ However, neither court appeared to seriously consider the host of questions raised by the FCC's new interpretation.²¹ The D.C. Circuit concluded that Section 706 *was* an independent grant of authority, but that the FCC had abused that authority by violating a provision of the 1934 Communications Act (the prohibition on imposing common carriage status on non-common carriers under Title I) — yet did not even bother to consider the FCC's argument that, since the Telecommunications Act of 1996 did not incorporate Section 706 into the 1934 Act, Section 706 is not constrained by the limits of the 1934 Act.²² This would be, of course, an absurd result, but it is not obviously any more absurd than the FCC's claim that Congress hid in the 1996 Act the power to essentially craft a new Communications Act within the constraints of the old one.

¹⁸ *Id.* at 80.

¹⁹ Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order, and Notice of Proposed Rulemaking*, CC Docket No. 98-147, at ¶ 69 (1998) [Advanced Services Order] (emphasis added), available at http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1998/fcc98188.pdf.

²⁰ See *Verizon v. F.C.C.*, 740 F.3d 623 (D.C. Cir. 2014) [*Verizon*]; *Direct Commc'ns Cedar Valley, LLC v. F.C.C.*, No. 11-9581 (10th Cir. 2014) [*Cedar Valley*], available at <http://www.gpo.gov/fdsys/pkg/USCOURTS-ca10-11-09581/pdf/USCOURTS-ca10-11-09581-o.pdf>.

²¹ See *id.* Indeed, the Tenth Circuit's analysis of this issue is clearly non-binding *dicta*, as it was not necessary for the holding of that case — and received scant analysis. *Cedar Valley*, at 59.

²² *Verizon*, 740 F.3d at 640.

This is, of course, not the proper forum to fully debate what the most accurate interpretation of Section 706 is – under *Chevron* or otherwise.²³ However, this discussion does indicate that substantial disagreement remains as to the proper interpretation of Section 706. And that, in and of itself, is likely enough to defeat any claim to field preemption, for even if Section 706 *does* provide independent authority for the Commission to promote broadband deployment beyond the powers granted elsewhere in the Communications Act, the statutory language and legislative history of the provision cannot reasonably support the inference that Congress left no room for states to supplement Section 706 with their own regulations designed to encourage broadband deployment.²⁴ Indeed, as there are at least two different plausible readings of Section 706 — as evidenced by the FCC itself having interpreted it in more than one way — and because Section 706 contains no express preemption provision, a court is duty bound “to accept the reading that disfavors pre-emption.”²⁵ Thus, Section 706 surely cannot provide sufficient legal authority to support a claim of field preemption here, and any preemptive effect it may have would need to be based on the theory of conflict preemption.

B. Whatever Authority Section 706 May Grant, the State Laws in Question Can Be Enforced Concurrently, and Do Not Clearly Frustrate its Purpose, So There Can Be No Conflict Preemption Either

Even if it were conceded that Section 706 is an independent grant of authority for the Commission, that still is not enough to justify preemption of the state laws in question here, because those state laws do not directly conflict with Section 706, nor do they clearly frustrate the purpose thereof. Section 706 directs the FCC to use its powers to promote reasonable and timely broadband deployment (technically, “advanced telecommunications capability”), without directly specifying whether such deployment need be private, public, or perhaps both.²⁶ If the laws in question flatly prohibited municipalities from deploying broadband networks to serve their citizenry, then the case for conflict preemption would be far stronger: laws prohibiting broadband deployment of one type would seem, at least at first blush, to

²³ If Section 706 is relied upon as the basis for preemption of state laws in this proceeding, or as the basis for the proposed Open Internet rules, perhaps the D.C. Circuit sitting en banc, another circuit court, and/or the Supreme Court may be willing to devote adequate time to this issue in response to a legal challenge.

²⁴ *Cf. Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88 (1992) (holding that state laws regarding licensing of particular professions within the state were preempted, because the federal Occupational Safety and Health Act of 1970 was intended by Congress to govern the entire field, without leaving any room for supplemental state regulations).

²⁵ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.” (quoting *Medtronic, Inc. v. Lohr*, 518 U. S. 470, 485 (1996))).

²⁶ See 47 U.S.C. § 1302.

directly contradict the statutory goal of Section 706 (although the Commission would still have to weigh the *net* effects of even such a prohibition, as discussed below²⁷). However, neither the laws and regulations in Tennessee nor the laws and regulations in North Carolina can fairly be read to prohibit municipalities from deploying broadband networks.

The laws and regulations at issue impose certain restrictions and conditions on the build-out of government-owned broadband networks, but they do not – contrary to popular assumption created by media coverage of this issue – actually *prohibit* such build-out, and they even provide certain immunities and exceptions for networks that have already begun to be built out to ensure that such networks are not crushed by undue regulatory burdens.²⁸ If these laws and regulations were designed only to restrict and frustrate the deployment of government-owned broadband networks, and served no other purposes, then, again, the case for conflict preemption would be much stronger. However, such is not the case here, as the laws and regulations in Tennessee and North Carolina quite clearly were designed with certain other purposes and goals in mind: notably, providing procedural safeguards to ensure that municipal governments obtain democratic consent for any broadband plans, and ensuring that the natural advantages such networks might have over private competitors do not unduly skew market forces in their favor.

As an initial matter, it is worth noting that economists and other experts in the field have yet to come to a consensus on the efficacy and value of government-owned broadband networks. Some argue that government-owned broadband networks present a valuable alternative to private deployment for unserved and underserved communities, while others argue that the deployment of government-owned networks inhibits the deployment of private networks — since taxpayer-funded networks have a number of inherent economic advantages over privately-funded networks — and therefore deploying government-owned networks may, in the long run and in the aggregate, actually result in lesser broadband deployment than if it were left entirely up to private companies.²⁹ While such disagreement persists, it is sensible

²⁷ See Section VI.A, *infra*.

²⁸ See EPB Petition, at 15-16 (admitting that Tennessee municipal electric systems are also authorized to also provide broadband services, but only within their service areas, and asking the FCC to preempt that requirement); Wilson Petition, at 26-27 (describing the provision in H.B.129 that exempts Wilson's broadband network from complying with the bill's "onerous requirements," but asking the FCC to preempt those requirements to allow Wilson to expand its broadband network into other counties without having to comply with H.B.129's regulations, which are ostensibly designed to level the playing field between public and private broadband networks).

²⁹ See, e.g., Joan Engebretson, *Municipal Broadband Opposition Laws: Pros and Cons — and Legality*, TELECOMPETITOR (May 9, 2014), available at <http://www.telecompetitor.com/municipal-broadband-opposition-laws-pros-and-cons-and-legality/>.

that individual states have been allowed to experiment – as “laboratories of democracy” – with different types of laws and regulations designed to promote broadband deployment, and over time, as the results of these different policies become more evident, a uniform Federal broadband deployment policy may be adopted. But in the meantime, such policy experimentation is beneficial, and should be commended by the FCC – not stifled.

Principles of federalism apply not only to the relationship between the Federal and state governments, but also apply within states, dictating the relationship between state and local governments. In that realm, state laws will always be deemed to preempt local laws, because cities and municipalities are purely creations of the state, giving states plenary power over their local subdivisions.³⁰ In the context of broadband deployment, states are also allowed to experiment with different policies and regulations at the local level, with the goal of eventually forming consensus before a state-wide policy is put into place. Tennessee and North Carolina, then, clearly have a least one legitimate policy goal in mind by placing certain restrictions on the EPB and Wilson government-owned broadband networks: Keeping the local policy experiments constrained, and limited in geographic scope, at least until consensus can be reached about the efficacy and value of such programs, lest the programs expand throughout the entire state and effectively supplant any private broadband deployment that might otherwise take place. It may well be that local governments are best able to deploy, operate, and upgrade broadband networks to serve the Internet access needs of their citizens, but such a conclusion is hardly obvious (based on the available body of evidence), so continued experimentation at the local and state level should be encouraged until a consensus on the point can be reached.

Thus, it seems that any claim for conflict preemption here is unlikely to succeed in court. The laws in Tennessee and North Carolina do not directly conflict with Section 706 — because one can concurrently “encourage” the “reasonable and timely” deployment of broadband while still imposing certain conditions as to where and how such deployment will take place — and, at least as of yet, it is not evident that the conditions imposed on the public networks in Chattanooga and Wilson clearly frustrate the purpose of Section 706, because the jury is still out on whether publicly funded government-owned networks will truly produce greater

³⁰ See, e.g., *Merriam v. Moody's Ex'r*, 25 Iowa 163, 170 (1868) (“In determining the question now made, it must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation — not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation — against the existence of the power.”).

broadband deployment than would privately funded networks, both in the aggregate and in the long-term. As such, conflict preemption would be an inappropriate step for the Commission to take at this time, and, on the current body of evidence, such a theory would likely be legally infirm anyhow.

III. The FCC's Power to Preempt Would Be a Double-Edged Sword

In its relentless drive to regulate net neutrality without Congressional authorization, the Commission has, by reinterpreting Section 706 as a sweeping grant of authority unto itself, opened a veritable Pandora's Box of regulation untethered to any clear basis in law and unconstrained by democratic process. Those urging the FCC to preempt restrictions on broadband would thus do well to heed the warning given by Matthew Berry, former FCC General Counsel and current Chief of Staff to Commissioner Ajit Pai: The power to preempt state laws restricting municipal broadband would also, presumably, include the power to restrict or perhaps even prohibit government-owned networks.³¹ As Berry recently said in a speech to the National Conference of State Legislators, a bipartisan forum of state lawmakers that has opposed preemption under Section 706:

If the history of American politics teaches us anything, it is that one political party will not remain in power for perpetuity. At some point, to quote Sam Cooke, "a change is gonna come." And that change could come a little more than two years from now. So those who are potential supporters of the current FCC interpreting Section 706 to give the Commission the authority to preempt state laws about municipal broadband should think long and hard about what a future FCC might do with that power.

For example, while today's FCC might reach the conclusion that state laws restricting municipal broadband projects are barriers to infrastructure investment and thus should be preempted under Section 706, that's not the only way to look at the issue. Most economists believe that municipal broadband projects deter private-sector infrastructure investment.... It's not hard, then, to imagine a future FCC concluding that taxpayer-funded, municipal broadband projects themselves are barriers to infrastructure investment. So if the current FCC were successful in preempting state and local laws under Section 706, what

³¹ Matthew Berry, Chief of Staff to FCC Comm'r Ajit Pai, Remarks at Nat'l Conference of State Legislatures' 2014 Legislative Summit (Aug. 20, 2014), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0820/DOC-328916A1.pdf.

would stop a future FCC from using Section 706 to forbid states and localities from constructing any future broadband projects? Nothing that I can see.³²

In short, if used to preempt state laws, Section 706 would become a political football, with its use potentially shifting 180 degrees between administrations. More generally, Section 706 could be used to justify a wide range of new FCC regulations. Thus, the question facing the Commission is not whether government-run broadband is a good idea – though we emphatically believe it is not. The question is whether three unelected bureaucrats at the FCC may intrude upon the sovereignty of the states to bypass the judgments of democratically elected state legislators regarding what cities, counties and towns – which are all creatures of the states, just as the FCC is a creature of Congress – may do that the Commission might claim relates to broadband deployment. If the FCC has the power to preempt state restrictions on municipal-run networks, it also has the power to *ban* such networks. Indeed, it is unclear where the Commission's powers would end.

And the process with which the Commission has undertaken this proceeding makes this outcome even more likely. The Commission has rushed this proceeding with astonishing speed. The Commission often takes months, or even years, to respond to petitions for declaratory ruling or rulemakings. Acting, as the Chairman seems intent to do,³³ with inadequate information and on a remarkably hurried schedule that, one can only assume, reflects political incentives rather than the Commission's mandate to serve the public interest, ensures that politics will predominate in the future, as well.

Rather than rushing towards preemption here, the Commission should do what Bill Clinton ordered Executive branch regulatory agencies to do back in his 1999 Executive Order on Federalism:

National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance. **Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate**

³² *Id.*

³³ Tom Wheeler, *Removing Barriers to Competitive Community Broadband*, FCC (June 10, 2014), available at <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband>.

State and local officials to determine whether Federal objectives can be attained by other means.³⁴

President Obama recently reaffirmed the wisdom of Executive Order 13,132.³⁵ Minimal respect for optimal agency process requires the FCC, in acting on these petitions, to engage in rigorous fact-finding and to exercise extreme caution before intervening. At minimum, the FCC can and should convene workshops, commission studies on the competitive effects of government-owned broadband, collect data from across the nation to study the broader effects (beyond the municipalities at issue) of government-owned networks, and the like. Failure to do so simply enshrines political considerations as the touchstone for the present and future interpretation of the nearly limitless authority the FCC claims under Section 706.

IV. Government-Run Broadband is Just “Groping in the Dark”

Markets are not perfect. Sometimes they do not serve consumers as well as we might like, especially in industries such as broadband, where service requires massive capital investments. But even worse than ignoring the possibility of market failure would be ignoring the reality of *government* failure, which tends to be more frequent, more intense and more persistent over time, since government failure cannot generally be corrected by market forces. The problem is not simply that government may not serve consumers well, but that it has a unique power to oppress them. As George Washington is said to have remarked, “Government is not reason, it is not eloquence, it is force; like fire, a troublesome servant and a fearful master. Never for a moment should it be left to irresponsible action.”³⁶

For all the complaints about “bottleneck” power that broadband companies might theoretically exercise, governments at all levels regularly exercise the power to censor speech, conduct surveillance on citizens, access stored communications without warrants, and otherwise invade their privacy. Both the possibility of government failure and the unique dangers posed by government need to be taken into account before rushing to the conclusion that government-owned broadband networks should displace private networks

³⁴ Exec. Order No. 13,132, 64 Fed. Reg. 153 (Aug. 4, 1999), available at <http://www.gpo.gov/fdsys/pkg/FR-1999-08-10/pdf/99-20729.pdf> (emphasis added).

³⁵ Memorandum for the Heads of Exec. Dep'ts & Agencies, Subject: Preemption (May 20, 2009), available at http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption.

³⁶ The quote is probably apocryphal, but its thrust remains. See Eugene Volokh, *Government Is Not Reason, It Is Not Eloquence — It Is Force*, Volokh Conspiracy, Apr. 14, 2010, <http://www.volokh.com/2010/04/14/government-is-not-reason-it-is-not-eloquence-it-is-force/>.

A. Giving Government Greater Control over Broadband Is a Dangerous Idea

We're all better off with a wall of separation between Net and State. In light of world experience, it is clear that many governments have abused their regulatory power for surveillance, control of information and censorship.

Following revelations by Edward Snowden about the reach of the NSA, the desperate need for ECPA reform, and other routine privacy revelations often made by government entities, do we really want them in direct control of Internet provision? EPB, in fact, brags in its petition about the benefits of surveillance:

Additionally, advanced broadband infrastructure would promote security and public safety. Such services as remote video monitoring of home, children, pets, and remote video monitoring of schools and businesses will enable greater public security. At a broader level, biometric screening at designated entry points/sensitive facilities, and remote surveillance of borders, ports, and airports will promote national security.³⁷

And the City of Wilson notes that “[t]he network has enhanced the capabilities of public safety agencies by facilitating the extensive deployment and interconnection of surveillance cameras.”³⁸

On top of this, government provision of Internet service raises real questions about what type of content will and should be available on public networks. For instance, should municipal broadband services allow access to pornography? In 2008, FCC Chairman Kevin Martin proposed a regulation to a spectrum auction that would have required its winner to build a wireless ISP that was smut-free.³⁹ Similarly, there have been proposed amendments at the state level which would require municipal broadband services to restrict access to pornography. Censorship like this normally would not survive First Amendment scrutiny, but government provision of the service may place it under a lower tier of review.

³⁷ Bento J. Lobo, et al. *The Impact of Broadband in Hamilton County, TN*, Exhibit 7 to EPB Petition Pursuant to Section 706 of the Telecommunications Act of 1996, 31 (Mar. 20, 2006), available at <https://www.epb.net/downloads/legal/EPB-FCCPetition-Exhibits.pdf#page=52>.

³⁸ Wilson Petition at 21.

³⁹ See Berin Szoka, *M2Z Reborn: Censored, but Free, Broadband is Now Kevin Martin's Top Priority*, TECH. LIBERATION FRONT (Dec. 1, 2008), <http://techliberation.com/2008/12/01/m2z-reborn-censored-but-free-broadband-is-now-kevin-martins-top-priority/>.

Meanwhile, as the EPB Petition demonstrates, at least some municipal broadband networks were constructed to facilitate the other functions of municipal utility systems. “By the mid-90’s, EPB recognized the need to enhance its electric system by the addition of [a] high-capacity, dedicated communications network.”⁴⁰ Government-owned broadband networks may well be managed to optimize these services to the possible detriment of consumer services. Moreover, when and if congestion or other constraints arise, presumably government services will be prioritized, again to the detriment of consumer services.

B. Government-Owned Networks Have a Poor Track Record of Serving Consumers

In the free market system, prices are created by allowing individuals to freely exchange goods and services. These prices are relied upon by entrepreneurs in order to make decisions about what kind of goods they will produce for consumers. But prices are also relied upon to help make decisions about what to use to produce the goods and services consumers want. The profit-and-loss mechanism helps businesses determine the best use of resources in serving the needs of consumers. Without the profit-and-loss mechanism, businesses, even if they could guess that a particular product or service is desired by consumers, would not know how to price it or how to produce it cost-effectively.⁴¹

Government-run enterprises do not face the same profit-and-loss mechanism. Because governments can use means not available to private enterprises, like taxation, they do not have to rely upon revenue from selling their goods and services on the market. At best, governments can mimic their competitors in the private marketplace in an attempt to “act like a business”: *i.e.*, they can offer similar products and services at a similar price and try to use similar business practices to bring them about cost-effectively. But without the profit-and-loss mechanism at the end, it is impossible to tell if they have actually increased consumer welfare or wasted taxpayer money.⁴²

Building a broadband network is not a simple one-time investment, but a dynamic, ongoing enterprise. A government-run broadband network must make many important decisions about what speeds to provide, whether to offer bundled services, what prices to offer these services at, and how much to invest in fiber, cable, DSL, or wireless infrastructure. It must also determine how to fund these projects: through subscriptions, bonds, taxpayer dollars, grants

⁴⁰ EPB Petition at 19.

⁴¹ See generally LUDWIG VON MISES, BUREAUCRACY (1944).

⁴² See Ludwig von Mises, *Economic Calculation in the Socialist Commonwealth* 26, in COLLECTIVIST ECONOMIC PLANNING (F.A. Hayek, ed., 1935) (“every economic change becomes an undertaking whose success can be neither appraised in advance nor later retrospectively determined. ***There is only groping in the dark.***”) (emphasis added).

from the federal government, cross-subsidization from utility revenue, etc. Without an accounting of profit and loss at the end, government actors cannot know the best way to produce the offerings that consumers value.

Of course, private companies are not perfect, but the free market rewards companies for providing things that consumers want in a cost-effective manner – and investing in future offerings according to expected future demand. Private firms have an obligation to maximize value for their shareholders and therefore must make financially sustainable investments driven by actual consumer demand. Public entities, on the other hand, do not have these incentives, and, as a result, they can (and sometimes do) engage in speculative projects at tremendous cost to taxpayers.⁴³ Unfortunately, the petitions at issue here are both premised on the idea that government-financed projects will outpace market-driven investment.

The evidence from even the Petitioners' own experiences confirms that local governments are not well-positioned to run municipal broadband networks. Both Greenlight in Wilson, NC and the EPB in Chattanooga, TN are held up as successful examples of government-run broadband projects. A closer look, though, reveals the very problems pointed out above as inherent in government-run enterprises.

1. Greenlight – Wilson, NC

The Wilson, NC network grew out of a previous attempt by the city to build a cable company in the late 1980s. In 1989, the city set aside \$4 million to study the viability of creating or acquiring a cable television company. In 2001, Wilson tried and failed to purchase a local cable provider's network. A later Wilson project was to partner with incumbent ISPs to build a fiber-to-the-home (FTTH) network, but ISPs did not want to assume the risk with the lack of demand. In 2006, Wilson City Council voted to authorize the issuance of \$28 million in debt to build the FTTH network, which went citywide in 2009. By January 2012, the network succeeded in passing over 20,000 households and the network began to expand into the surrounding county.⁴⁴

Wilson's "investment" has been funded primarily by borrowing. In 2008, the City Council issued over \$33 million of certificates of participation (akin to revenue bonds), which are secured by a

⁴³ See *infra* notes 102 to 104 and accompanying text.

⁴⁴ CHARLES M. DAVIDSON & MICHAEL J. SANTORELLI, UNDERSTANDING THE DEBATE OVER GOVERNMENT-OWNED BROADBAND NETWORKS: CONTEXT, LESSONS LEARNED, AND A WAY FORWARD FOR POLICY MAKERS 88 (June 2014), available at <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf>.

lease on the network's equipment.⁴⁵ Wilson borrowed an additional \$4.75 million from Wells Fargo in 2010.⁴⁶ While touted by supporters as a benign alternative to taxation, the truth is that bonds and loans are in reality a promise of future taxation if the project does not receive an adequate return on investment.⁴⁷ In other words, the reliance on borrowing by Wilson does not mean taxpayers will not still ultimately be on the hook for the fiber network. Further, as noted below, Wilson has had to rely on cross-subsidization from government-run utilities to cover operating expenses.

While fiber has been called "future-proof"⁴⁸ by some, there are no guarantees that this type of technology will not be obsolete by the time the 25-year bonds mature. And even if today's fiber optic cables remain the best medium for carrying data, there is far more to a "fiber" network than just the fiber itself; the network involves a considerable amount of routers and other hardware. Wilson is gambling that innovation will not overtake fiber – and we can only hope this is not like investing in a local train station before the dawn of the interstate highway system. The history of creative destruction suggests that no technology is safe from the future.⁴⁹

This is particularly true where Moore's Law is involved: if the cost of computing power falls by half every eighteen months,⁵⁰ then investing in more computing equipment today than is really needed may be enormously, and unnecessarily, costly, raising the entire cost of the system. The prospect of rapidly falling equipment costs helps to explain why, for example, Verizon has only gradually invested in the equipment needed to deliver the gigabit speeds of which its fiber network has been theoretically capable since the day fiber was put into the ground. Moore's Law also helps to explain why AT&T has chosen an even more gradual deployment path, laying fiber to the node and exploring a variety of technologies for upgrading the DSL connections between the node and the user, AT&T is now in the midst of upgrading its network to offer 45-70 mbps service throughout much of its footprint. While this service will not be as fast as

⁴⁵ *Id.* at 89.

⁴⁶ *Id.*

⁴⁷ This, in fact, was explicitly promised on the certificates of participation: "The COP agreement states that if revenue derived from the network is not enough to make payments, the city will use taxpayer money from the city's general fund to cover those obligations." *Wilson Certificates of Participation Series 2008*, at 15.

⁴⁸ Susan Crawford, *Route Around Cable Behemoths*, THE BOSTON GLOBE (Feb. 21, 2014), <http://www.bostonglobe.com/opinion/2014/02/21/route-around-cable-behemoths/33mk4oWbFXh6G8WDEFUR6K/story.html>.

⁴⁹ See, e.g., JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

⁵⁰ See, e.g., Michael Kanellos, *Moore's Law to Roll on for Another Decade*, CNET (Feb. 10, 2003), available at <http://news.cnet.com/2100-1001-984051.html>.

Verizon's FiOS service, it will be faster than the vast majority of customers currently demand. And this is precisely the point: it is impossible to say with any certainty which deployment path is better. These companies, like all broadband companies, are experimenting with the right mix of technologies and investment to deliver the mix of products demanded by consumers in an uncertain future.

After building out the network, Wilson needed to determine at what prices to offer its services. Political pressure to offer a lower than market price needs to be balanced with the need to recoup the initial investment. Further, setting the prices too low could actually impact the viability of entrance by competitors or drive out competition already present. The end result could be that Greenlight becomes a monopoly in the area, which may undercut the original goal of encouraging competition with private ISPs.⁵¹

On the other hand, setting the price too high could mean that Greenlight does not effectively compete with competitors. So far, Greenlight's adoption rates have been limited, as it has somewhere between 6,000 and 7,000 subscribers, which represents only about one-third of the market.⁵²

So far, Wilson has struggled to find the right price, and this has resulted in insufficient revenues to cover operating expenses:

- Greenlight lost a combined \$2.5 million in 2009 and 2010 and required an additional \$11 million in cross-subsidies from electric and gas funds. Those resulted in 50 percent higher electricity rates and 30 percent higher natural gas rates for similar services provided by local utilities Progress Energy and PSNC Energy.⁵³
- In 2012, the network had an operating loss of \$220,956.⁵⁴

On top of this, debt servicing and asset depreciation could lead to serious long-term sustainability issues.⁵⁵

⁵¹ See generally JOHN R. LOTT, ARE PREDATORY COMMITMENTS CREDIBLE?: WHO SHOULD THE COURTS BELIEVE? (1999).

⁵² See Wilson Petition at 97.

⁵³ Anthony McConnell, *NC Legislators Seek Level Field for Muni Wi-Fi*, HEARTLAND (Mar. 25, 2011), <http://news.heartland.org/newspaper-article/2011/03/25/nc-legislators-seek-level-field-muni-wi-fi>.

⁵⁴ DAVIDSON & SANTORELLI, *supra* note 44, at 90.

⁵⁵ *Id.* at 89-90.

2. Electric Power Board – Chattanooga, TN

The Electric Power Board in Chattanooga, TN shows similar difficulties in determining what speeds to offer, how to produce it, and what prices to set. The fiber network arose out of the electric company's decision to build a communications network in the late 1990s. While initially underutilized, easing of state laws on competition with telecommunications providers allowed EPB to expand into providing broadband services.⁵⁶

The \$390 million EPB fiber network has been financed by a combination of loans from the electrical utility subdivision, federal stimulus money, and borrowing. EPB Electric helped EPB Fiber get started with a \$50 million loan. In 2009, EPB received \$111.5 million from the federal stimulus funding from the U.S. Department of Energy for the smart grid system. EPB also issued \$229 million of local revenue bonds, of which \$162 was used to fund the fiber build-out.⁵⁷ Each of these sources is either directly or indirectly from the taxpayer: either through subsidies ultimately out of the federal purse, through loans from the electric division which has a monopoly over provision of electric, or from bonds which must be paid back, even if at taxpayer expense. None represent real "investment" from the private sector.

Much like Greenlight, EPB's service is based around its fiber offering, which they are betting will last as long as the 25-year bonds funding it. Also like Greenlight, the EPB has had a real problem in determining how to price its services. For the highest speed service, symmetrical gigabit speed, EPB charged \$350 a month, with little adoption.⁵⁸ As of August 2012, the "EPB estimate[d] that nine residents and two businesses pay the hefty \$350-per-month charge. Most use a 30-megabit-per-second (mbps) connection, which is still far faster than the American average of 6.7mps."⁵⁹ In order to stimulate more adoption the price was slashed to just \$70 a month in 2014.⁶⁰ In other words, EPB's pricing swung from one side of the pendulum to the other, but it is still unclear what the true market price should be. As of 2010, EPB's 4-

⁵⁶ *Id.* at 51.

⁵⁷ *See id.* at 51-52.

⁵⁸ *See* Steve Lohr, *Fastest Net Service in U.S. Coming to Chattanooga*, NEW YORK TIMES (Sept. 12, 2010), <http://www.nytimes.com/2010/09/13/technology/13broadband.html> ("We don't know how to price a gig," said Harold DePriest, chief executive of EPB. "We're experimenting. We'll learn.")

⁵⁹ *The need for speed: What superfast internet connections can do for a city*, THE ECONOMIST (Aug. 11, 2012), available at <http://www.economist.com/node/21560288?frsc=dg%7Ca>.

⁶⁰ *We Are Gig City*, EPB (last accessed Aug. 29, 2014), <https://epbf.com/gigsupport/>.

year cumulative deficit from its “investment” in fiber and communications services was \$41,302,000.⁶¹

These pricing decisions have secondary effects. According to competitors like David Snyder, who operates an ISP in Dayton, 35 miles north of Chattanooga, EPB’s presence offers little incentive to compete in that city. He argues that EPB may eventually have a monopoly because fewer and fewer private companies wish to compete against it:

A lot of people (in Chattanooga) believe EPB is a private competitor who is giving Comcast and AT&T what they deserve for their poor customer service. But now there are tremendous advances in telecommunications for local competition and a lot of investment going on by private companies. AT&T competes with Comcast for television delivery services, for instance. It’s a major disincentive when you have a government-subsidized competitor there. There is robust competition in this industry, and it is getting more robust by the day.⁶²

To be fair, EPB Fiber has received enough revenue from subscribers to cover operating expenses in recent years. Its revenues were \$80 million in 2013, with expenses of \$59,877,000.⁶³ On the other hand, EPB Fiber’s total liabilities are \$78,055,000, and the utility’s total liabilities are \$514,808,000, so it’s not as if the utility is operating in the black overall.⁶⁴ Additionally, EPB’s bond rating was downgraded as a result of the credit risk created by its utility cross-funding scheme.⁶⁵

3. Other Examples

If this isn’t enough, the evidence from other attempts at municipal broadband networks reveals overwhelming failure:

⁶¹ Ronald J. Rizzuto, *Financial Performance of Tennessee’s Municipal Cable and Internet Overbuilds in 2009* 15 (Working Paper, Feb. 25, 2010), available at http://media.timesfreepress.com/docs/2010/05/Rizzuto_report_on_Tennessee_telecoms.pdf.

⁶² Christopher Butler, *Chattanooga residents get Internet, courtesy of taxpayers*, Tennessee Watchdog (Dec. 11, 2011), available at <http://watchdog.org/1019/tn-chattanooga-residents-get-internet-courtesy-of-taxpayers/>.

⁶³ DAVIDSON & SANTORELLI, *supra* note 44, at 53.

⁶⁴ *Id.*

⁶⁵ *Id.*

- The city of Groton, Connecticut borrowed \$34.5 million to build a broadband network, ran the network at a \$2.5 million annual loss, sold the network for \$550,000, and left taxpayers with the bill.⁶⁶
- The “financially troubled” (and ironically named) UTOPIA project has saddled Utah cities with debt, leading at least one such city to propose property tax increases in order to meet its network-related debt obligations.⁶⁷ Tellingly, this city’s leadership has fought for the right to omit any mention of UTOPIA in its tax increase referendum because, in the words of one resident, it is “embarrassed about the financial fiasco that UTOPIA has caused.”⁶⁸
- LUS Fiber in Lafayette, Louisiana faced revenue problems for years due to insufficient uptake from consumers, having to readjust projections and repayment plans several times.⁶⁹
- The fiber network in Provo, Utah, known as iProvo failed so badly⁷⁰ that it was first sold to Broadwave Networks and then essentially given away to Google for \$1. In the meantime, it cost taxpayers millions of dollars in an attempt to pay off its debt.⁷¹
- Australia’s National Broadband Network has fallen victim to mismanagement, political turmoil, and massive cost overruns. The project began as a government plan to invest \$43 billion to build fiber-to-the-premises facilities to 90% of Australian homes, schools, and workplaces,⁷² but it eventually became clear that costs would run tens of billions of

⁶⁶ See Deborah Straszheim, *How a Promising Idea Went Terribly Wrong in Groton*, GROTON PATCH (Jan. 6, 2013), available at <http://groton.patch.com/groups/politics-and-elections/p/how-a-promising-idea-went-horribly-wrong-in-groton>; Greg Smith, *Groton’s Deal to Shed TVC Finalized as New Owners Take the Reigns*, THE DAY (Feb. 1, 2013), available at <http://www.theday.com/article/20130201/NWS01/130209982/0/Search>.

⁶⁷ See Steven Oberbeck, *Orem Tax Hike Ballot to Fund UTOPIA Won’t Mention the Troubled Network*, THE SALT LAKE TRIBUNE (Sept. 13, 2013), available at <http://www.sltrib.com/sltrib/money/56862022-79/utopia-ballot-orem-court.html.csp>.

⁶⁸ See *id.*

⁶⁹ Nathan Stubbs, *Inside LUS Fiber’s new marketing push and why it’s crucial to the business’ long-term success*, IND (Nov. 24, 2010), <http://www.theind.com/cover-story/7339-market-share>.

⁷⁰ Steve Titch, *Spinning its Wheels: An Analysis of Lessons Learned from iProvo’s First 18 Months of Municipal Broadband*, REASON FOUNDATION (Dec. 2006), <http://reason.org/files/33224c9b01e12f3b969f4257037c057e.pdf>; Steve Titch, *Think Tank: iProvo’s Losses at \$8 Million and Counting*, REASON FOUNDATION (Apr. 16, 2008), http://www.reason.org/news/iprovo_municipal_wifi_broadband_update_041608.shtml.

⁷¹ Steve Gehrke, *iProvo gets OK for tax surplus: Council votes 5-1 to bail out fiber-optic system*, THE SALT LAKE TRIBUNE (Jun. 6, 2007), available at http://www.sltrib.com/SEARCH/ci_6080894.

⁷² See Joint Media Release by Steven Conroy, Minister for Broadband, Communications and the Digital Economy, *et al.*, “New National Broadband Network” (Apr. 7, 2009), available at http://www.minister.dbcde.gov.au/conroy/media/media_releases/2009/022.

dollars over budget.⁷³ New leaders proposing to scale the project back to a fiber-to-the-node architecture in order to reduce costs were recently elected,⁷⁴ and the future of Australia's National Broadband Network now hangs in the political balance.⁷⁵

- In Finland, a fiber project is struggling. Sparsely populated areas of the north are especially hard to wire, leading to much higher total costs for the initiative. In total, the price tag to bring 100 Mbps of service to within two kilometers of all of Finland will be up to a staggering €53,000 (\$68,000) per household.⁷⁶ For their own part, regional authorities have been burdened with the excessive bureaucracy, and many of the local projects slated for development have had to wait because the actual bill has been more than projected.

V. This Proceeding is a Polarizing Distraction from Actually Promoting Broadband Deployment

What Petitioners claim is that only cities can or will provide *gigabit* service in some areas—but they use Section 706 and other indications of Congress' intent to incentivize the deployment of *broadband* to support the claimed need for gigabit service. This is a sleight of hand. There is nothing in Section 706 to suggest that resources should be diverted from extending broadband deployment to communities where it doesn't exist at all to support offering faster service to communities that already have it.

And there is no evidence to support the need for gigabit service, even if it weren't contrary to Congressional intent.

The same 1960s technocratic mindset that brought needless subsidies to the now-abandoned Concorde underlies today's calls for public-financed gigabit networks.⁷⁷ Supersonic air travel technology hasn't progressed since 1969 because *even now* — let alone in 1969 — there is

⁷³ See Annabel Hepworth, *NBN Costs Set to Soar Past \$60bn*, THE AUSTRALIAN (July 24, 2013), available at <http://www.theaustralian.com.au/business/in-depth/nbn-costs-set-to-soar-past-60bn/story-e6frgaif-1226684023561>.

⁷⁴ See "The Coalition's Plan for Fast Broadband and an Affordable NBN" (Apr. 2013), available at <http://paweb-static.s3.amazonaws.com/Policies/NBN.pdf>.

⁷⁵ See Annabel Hepworth, *Coalition to Delay NBN Laws Until 2014*, THE AUSTRALIAN (Sept. 13, 2013), available at <http://www.theaustralian.com.au/national-affairs/election-2013/coalition-to-delay-nbn-laws-until-2014/story-fngqr68y-1226718041481>.

⁷⁶ Cyrus Farivar, *Finland: Plan for universal 100Mbps service by 2015 on track*, ARSTECHNICA (Oct. 31, 2012), <http://arstechnica.com/business/2012/10/finland-plan-for-universal-100mbps-service-by-2015-on-track/>.

⁷⁷ See, e.g., Robert Kenny and Charles Kenny, *Superfast: Is It Really Worth a Subsidy?* (Communications Chambers, November 2010), available at http://charleskenny.blogs.com/files/overselling_fibre_1127.pdf.

insufficient demand to support it. Both rest on the same core fallacy: The technologies (in both cases focused solely on speed) behind today's transportation/communications networks are inadequate to support the next generation of uses — and government subsidies are required to get us from "here" to "there."

As with the Concorde, government subsidy of, and investment in, fiber networks seems misplaced:

[F]iber to the home may be no more worth[y] of subsidy than Concorde. Flashy and exciting, to be sure – but ultimately not worth the price.⁷⁸

Air transportation *was* transformed during the period Concorde operated (1976 to 2003), but that transformation had nothing at all to do with the lavish public subsidies for Concorde and everything to do with smarter public policy — namely, removing regulatory barriers that had dictated a specific (inefficient) market structure and protected incumbent operators from competition. The price of air transportation has fallen by almost 50% since deregulation.⁷⁹ People got what they wanted, and what they wanted was inexpensive air travel, not supersonic speed. One of the heroes of this transformation, Ryanair CEO Michael O'Leary, had this to say about air travel and the mindset that brought us the Concorde:

The problem with aviation is that for fifty years it's been populated by people who think it's this wondrous sexual experience; that it's like James Bond and wonderful and we'll all be flying first class when really it's just a bloody bus with wings.... Most people just want to get from A to B. You don't want to pay £500 for a flight.⁸⁰

Most people want to use the Internet to surf the Web, send emails and watch videos. And whether they have to pay for it directly, through taxes or through forestalled investment elsewhere, there's little evidence that they want or need the broadband equivalent of supersonic transport to do it. Perhaps most important, there is no evidence of market failure in need of correction — no evidence that today's ISPs and today's infrastructure are failing

⁷⁸ *Id.*

⁷⁹ See Mark J. Perry, *Even with baggage fees, the 'miracle of flight' remains a real bargain; average 2011 airfare was 40% below 1980 average*, AEI (Aug. 29, 2014), <http://www.aei-ideas.org/2012/10/even-with-baggage-fees-the-miracle-of-flight-remains-a-real-bargain-average-2011-airfare-was-40-below-1980-level/>.

⁸⁰ Jonathan Glancey, *Concorde: A 20th Century Design Classic*, BBC (May 30, 2013), <http://www.bbc.com/culture/story/20130529-concorde-on-a-different-plane>.

appropriately to offer the speed and other characteristics that users demand, nor that they will fail to do so in the future.

Before we use taxpayer funds to build the Concorde of the Internet, we should be sure there is a sound basis for doing so. ISPs are already supplying broadband well in excess of current and anticipated demand (as defined by speed, capacity, latency, etc.) and ISPs seem fully capable of meeting all anticipated demand. Moreover, this is true based on current and future investment by ISPs (more than \$50 billion worth in 2012 alone according to the Progressive Policy Institute⁸¹) — investment that has been sufficient to ensure that there has never yet been a supply bottleneck in broadband.

Rather than support Petitioners' assertions that the agency should subsidize a technology picked because of an arbitrary, top-down decision that people should have a certain speed even if they don't yet want it, the FCC should consider ways to encourage state and local governments to reduce regulatory barriers to expanding private provision of broadband at useful speeds.

The FCC should heed the wisdom of Australia's newly minted Communications Minister, who explained his government's decision to abandon plans for a national fiber-to-the-home network in favor of subsidizing slower, but far less expensive fiber-to-the node connectivity:

The Government is thoroughly open-minded; we are not dogmatic about technology. Technology is not an ideological issue; we are completely agnostic about it. What we want to do is get the best result for taxpayers and consumers as soon as possible.⁸²

A. There's No Economic Basis for Artificially Promoting Gigabit Fiber

The Petitioners envision a world where gigabit speed is a necessity, despite the lack of demand for such speeds, or the indication that ISPs are incapable of meeting either current or future demand.

As the National Broadband Map shows, American citizens have increasingly adopted faster Internet services as they perceived the need to do so for their employment and entertainment

⁸¹ Diana G. Carew & Michael Mandel, *U.S. Investment Heroes of 2013: The Companies Betting on America's Future*, PROGRESSIVE POLICY INSTITUTE, Sept. 2013, available at http://www.progressivepolicy.org/wp-content/uploads/2013/09/2013.09-Carew-Mandel_US-Investment-Heroes-of-2013.pdf.

⁸² *Government aims for NBN cost and time savings*, AUSTRALIAN BROADCASTING CORPORATION (Sept. 24, 2013), available at <http://www.abc.net.au/7.30/content/2013/s3855656.htm>.

needs.⁸³ To put it another way, supply has closely paralleled demand — almost as if, despite governmental barriers to competition, markets worked reasonably well.

High quality video-streaming is one of the more data-intensive services driving the demand for faster networks. But, even here, the speeds currently available in the marketplace are quite ample for most consumers. Today, as little as 3.8 Mbps is all that is necessary to run Netflix's current video service, which has led one critic to ask "How much faster [Internet service] does anybody really want or need?"⁸⁴ Even Netflix Super HD, which streams at the maximum supported by most televisions and screens (1080p) requires only 5 Mbps.⁸⁵ When Reed Hastings of Netflix announced plans to launch 4K video (four times the resolution of 1080p⁸⁶) in early 2014, he claimed this would require only 15 Mbps. Perhaps allowing room for multiple connections and other Internet use, he added: "It's not too bad. If you've got a 50-megabit connection you'll be fine."⁸⁷ He also claims demand for the service will grow slowly, ensuring ISPs have "lots of time to build the infrastructure"⁸⁸

Moreover, absolute network speed isn't always the most price effective means of serving content quickly, and myriad other network improvements can do as much or more to enable the quality of service users demand. Networks continue to develop and implement network management technologies (like CDNs, for example) to reduce physical distance, optimize network routing, and compress or streamline data transmission, among other things. Firms are investing in and developing technologies — without any prodding from the government — to make their networks faster, yes, but also more reliable, secure and robust.

Petitioners' effectively seek FCC support for taxpayer subsidies for municipal broadband projects in areas that are already served by unsubsidized providers. This reaches far beyond the ostensible objective of Section 706. Adopting the proposed course of action would unfairly

⁸³ See *Broadband Statistics Report: Access to Broadband Technology by Speed*, NATIONAL BROADBAND MAP (Jul. 2013), <http://www.broadbandmap.gov/download/Technology%20by%20Speed.pdf>.

⁸⁴ David Talbot, *Not So Fast: A Google Fiber One-Gigabit Mystery*, MIT TECH. REV. (Sep. 20, 2013), <http://www.technologyreview.com/view/519466/not-so-fast-a-google-fiber-1-gigabit-mystery/>.

⁸⁵ *Internet Connection Speed Recommendations*, NETFLIX (last accessed Aug. 29, 2014), <https://help.netflix.com/en/node/306>.

⁸⁶ *What is the difference between 1080p and 4K resolution?*, SONY (last accessed Aug. 29, 2014), http://esupport.sony.com/p/support-info.pl?info_id=1348&template_id=1®ion_id=3.

⁸⁷ Jeff Baumgartner, *Netflix CEO: 15-Meg Will Be Good Enough To Stream 4K*, MULTICHANNEL NEWS (Sep. 20, 2013), <http://www.multichannel.com/distribution/netflix-ceo-15-meg-will-be-good-enough-stream-4k/145595>

⁸⁸ *Id.*

and unwisely distort the marketplace and weaken private-sector providers' incentives to continue investing in their networks.

Preemption will likely *reduce* private investment by crowding it out. Not only is it unfair to companies that have invested a combined \$1.3 trillion dollars in the last 20 years,⁸⁹ but doing so would reduce the incentives for companies to raise and invest capital in high-speed networks going forward: Why bother if the government is going to do it with taxpayer dollars?

It should similarly make no difference to a national regulator like the FCC whether municipal broadband projects induce certain firms to move from areas with slower broadband access to areas with municipal fiber. To a first approximation, such moves should be a wash from the perspective of the national public interest that the FCC is charged with upholding.

VI. Government Subsidization and Ownership of Broadband Deters Private Broadband Deployment and Competition, thus Violating Section 706

Petitioners argue that the FCC should

find that advanced telecommunications capabilities, including high-speed broadband services, are not being deployed in a reasonable and timely manner...and that the primary reason for this is a State barrier to municipal broadband deployment – Section 160A-340. The Commission should find that the purpose and effect of this provision is to thwart or unreasonably delay broadband investment and competition, and that preemption of Section 160A-340 would accelerate broadband investment and competition in these areas. The Commission should therefore take immediate action to preempt Section 160A-340 and declare it to be unenforceable.⁹⁰

For the reasons discussed below, these assertions are unsupported. On the one hand, theory and evidence do not support the claim that restrictions on municipal broadband thwart overall broadband investment and deployment, even in the municipalities at issue. But even more importantly, these claims simply ignore the effects of municipal broadband deployment on areas *outside* the municipality. Federal broadband policy seeks to ensure that broadband is deployed to under-served and costly-to-serve areas nationwide. The total effect of municipal broadband must be taken into account, not simply its short-term and local effects.

⁸⁹ See Ben Sperry, *Will the Real Broadband Heroes Please Stand Up?*, TRUTH ON THE MARKET (Sept. 9, 2013), <http://truthonthemarket.com/2013/09/19/will-the-real-broadband-heroes-please-stand-up/>.

⁹⁰ Wilson Petition at 1.

A. Overall broadband deployment is adversely affected by municipal broadband.

The FCC has, in several contexts, adopted efforts to ensure the widest possible broadband availability.

The universal service challenge of our time is to ensure that all Americans are served by networks that support high-speed Internet access—in addition to basic voice service—where they live, work, and travel. Consistent with that challenge, extending and accelerating fixed and mobile broadband deployment has been one of the Commission’s top priorities over the past few years. We have taken a series of significant steps to better enable the private sector to deploy broadband facilities to all Americans.⁹¹

Of particular interest, of course, are

costly-to-serve communities where even with our actions to lower barriers to investment nationwide, private sector economics still do not add up, and therefore the immediate prospect for stand-alone private sector action is limited.⁹²

But it is no defense of *disincentivizing* or deterring private sector broadband investment in these communities that build out has been slower there than elsewhere. By definition, these are the most difficult communities to serve. But even more important, it is no defense of substituting an arbitrary preference for government-owned broadband with the effect of further exacerbating the difficulties for private providers of building infrastructure in under-served communities.

It is ironic, then, for the Petitioners to claim support for municipal broadband in the National Broadband Plan and Section 706 based on the assertion that

it would be impossible to make the benefits of broadband connectivity available to “all Americans” on a reasonable and timely basis without the participation of municipalities, particularly in areas in which the private sector found investment unattractive.⁹³

⁹¹ USF& ICC Modernization Report & Order, *In the Matter of Connect America Fund, etc.*, WC Docket No. 10-90, ¶ 5 (Nov. 18, 2011), available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-161A1.pdf.

⁹² *Id.*

⁹³ Wilson Petition at 13.

Whatever the effect may be on a particular locality, the effect of municipal broadband more broadly—that is, *outside* the Petitioners’ immediate areas—is not assessed in any of the Petitioners’ materials. But to the extent that government-owned broadband deters infrastructure investment by private firms overall, particularly in areas adjacent to or otherwise financially supported by income generated in the lower-cost areas at the core of Petitioners’ service areas, government-owned broadband can actually diminish the availability of broadband connectivity for “all Americans.”

In fact, the Commission has previously recognized this point. In the USF/ICC Modernization Order, the FCC went to great lengths to try to minimize the incentives for duplicative deployment, acknowledging that doing so could distort investment incentives and take away from the statutory objective of widespread broadband deployment:

[R]eforms we adopt elsewhere in the Order are designed to achieve nearly ubiquitous broadband deployment. In...areas, where the incumbent service providers will be responsible for achieving the universal service goals, we find it would not be in the public interest to provide additional support to carriers providing duplicative services. In addition, in areas where unsubsidized providers have built out service, no carrier – incumbent or competitive – will receive support, placing all providers on even footing.⁹⁴

The reality is that most municipal broadband deployment has occurred where existing networks already operate.⁹⁵ Further encouraging more municipal broadband deployment will likely further this trend in the near term.

But there is an even more insidious, and far less visible, effect on under-served communities of promoting municipal broadband deployment.

Precisely because serving costly-to-serve communities is, well, costly, the government undertakes through various initiatives like Connect America and LifeLine (among others) to subsidize such service. But private broadband providers already “self-subsidize” build-out to these communities.

In the first instance, to the extent that last- and middle-mile networks piggyback on fiber backbone, IXs and other network-wide elements, the construction and operation of these

⁹⁴ *Id.* at ¶ 509.

⁹⁵ DAVIDSON & SANTORELLI, *supra* note 44, at 50. & n. 277.

infrastructure elements can be, and is, financed by more lucrative networks in densely-populated and high-demand urban areas. The same goes for basic services that operate throughout the network, from billing services to management knowhow to customer service structures.

But even more, because economies of scale and network effects ensure that the value of adding new subscribers in under-served areas benefits not only those subscribers but the entire network, large private networks in particular have an incentive to expand infrastructure even to areas where the expected return is lower, because some of that return can be recouped by making their existing (or new) infrastructure construction in other areas more valuable.

Over and above these, broadband providers have public relations, marketing and political incentives to add under-served areas to their larger networks. And, as the Wilson Petition points out,

private networks have long been able to offer "loss leader" offers and intro pricing to get people to sign up, and the large ISPs can all use profits from one area to subsidize below-cost prices in another.⁹⁶

In short, the debate about investment incentives and broadband build out to date and evinced in the EPB and Wilson Petitions is inappropriately myopic. While the incentive effects within the immediate municipal area are important (and there is, as discussed, ample reason to think that subsidized municipal broadband crowds out private investment), the real issue is what effect municipal broadband has on incentives to invest in broadband *far beyond* the immediate area.

For these areas, of course, it may be *only* private providers that can internalize the possible negative effects: Despite Petitioners' claims to want to extend service, municipal providers are unlikely to operate networks with the economies of scale present in large private networks. As a result, not only do municipal providers potentially deter private construction, they are institutionally indifferent to the effects of their services on deployment *outside* their immediate areas. This is true, of course, even if municipal service is extended beyond its utility service area, as EPB seeks to do. And it is not economically feasible to expect EPB, for

⁹⁶ Wilson Petition, Attachment A, Section by Section Analysis of Section 160A-340, addressing § 160A-340.1 (a)(8), available at <http://www.baller.com/pdfs/wilson706petition.pdf#page=64>. While this is raised by the Petition in a challenge to the state rules that would prohibit cross-subsidization of broadband by municipal services from other utility revenues, we don't address that issue here. We do note, however, that the municipal cross-subsidies prohibited by the law are of a completely different nature than private broadband cross-subsidies.

example, to become a nationwide or even statewide broadband provider. EPB may have public service or political motives for extending service somewhat, but absent profit motive, it is unlikely to seek to extend its service beyond a relatively small geographic area in which it receives these benefits. In fact, particularly because doing so entails large upfront expense, local government is likely to restrict any efforts to do so to the extent that they imperil the financial health of the government. The most powerful evidence of this comes from the fact that, although its reach is unrestricted by law,⁹⁷ EPB's telephone service territory is limited to its electricity boundary—a small area in Chattanooga's immediate vicinity.⁹⁸

Consider the area around Chattanooga. As Exhibit 1 to the Chattanooga Petition makes clear, while Chattanooga itself benefits from EPB's deployment, there are significant areas around the city that are lacking in service; similarly, there are significant areas already serviced by private broadband providers.⁹⁹ Unless and until all of the areas currently lacking service are served by EPB, those areas are made less likely to be served by private providers who have reduced incentive to leverage their Chattanooga network to make further infrastructure investments in these areas. From the perspective of ensuring the broadest possible coverage and overcoming the digital divide, Chattanooga's municipal broadband service is actually an impediment.

It is also noteworthy that so much of the area around Chattanooga is already serviced by private broadband providers. These are decidedly high-cost areas, and certainly more costly to service than EPB's largely urban service area (which already had broadband service when EPB came along, of course¹⁰⁰). The claim that municipal service is essential to ensure broadband ubiquity is betrayed by EPB's own map, which shows that private providers had the incentive and ability to expand broadband access widely.

If Section 706 is an independent grant of authority that authorizes the FCC to intervene in state broadband regulation for the sake of Section 706's mandate, intervening for the purpose of

⁹⁷ See EPB Petition, at 2, 15-16.

⁹⁸ See *id.* at 16-17.

⁹⁹ *Map Showing Areas Unserved or Underserved by Broadband*, Exhibit 1 to EPB Petition Pursuant to Section 706 of the Telecommunications Act of 1996, 1 (Mar. 20, 2006), available at <https://www.epb.net/downloads/legal/EPB-FCCPetition-Exhibits.pdf#page=1>.

¹⁰⁰ See TNWatchdog Staff, *Chattanooga Residents Get Internet Courtesy of Taxpayers*, TENNESSEEWATCHDOG (Dec. 21, 2011), available at <http://watchdog.org/1019/tn-chattanooga-residents-get-internet-courtesy-of-taxpayers/> ("As stated at the time, EPB wanted its new telecommunications division, still a government-run entity, to take at least 35 to 50 percent of the cable TV, telephone and high-speed Internet market from the private entity Comcast, the primary provider of such services in Chattanooga.").

undoing or limiting state limitations on municipal broadband fails to further the Section's objectives, and Section 706 cannot be said to authorize such an intervention. It would be contrary to Section 706 for the Commission to support municipal broadband deployment where doing so would impede private providers' incentives to build out in under-served and high-cost areas. As the Commission has said elsewhere:

[T]he Commission has recognized that one of the most significant barriers to investment in broadband infrastructure is the lack of a "business case for operating a broadband network" in high-cost areas "[i]n the absence of programs that provide additional support." Extending federal support to carriers deploying broadband networks in high-cost areas will thus eliminate a significant barrier to infrastructure investment and accelerate broadband deployment to unserved and underserved areas of the Nation. The deployment of broadband infrastructure to all Americans will in turn make services such as interconnected VoIP service accessible to more Americans.¹⁰¹

Supporting municipal broadband would undermine the "business case for operating a broadband network" as much as would removing "programs that provide additional support."

B. Competition is adversely affected by municipal broadband

Government-owned networks are also more susceptible than private networks to competition problems that may impede the purposes of Section 706 and impose costs.

In the first place, although Petitioners promote their networks as offering a competing, additional broadband option in areas where private networks already offer service, there is every reason to expect that taxpayer-subsidized competition from government-owned networks will crowd out further private investment and will ultimately lead to the termination of private service. We should be more wary of government-supported monopolies than private ones.

The monopoly result is, in fact, more likely to arise with the presence of government-owned networks. Public service providers have an incentive, like private firms, to lower prices to drive out competition. But, unlike private firms, they also have an incentive to keep prices relatively low. While this may *seem* beneficial (and, indeed, public firms tend to engage in cross-subsidization in order to offer below-cost pricing to some consumers), public firms' ability to credibly commit to predatory or below-cost pricing means the likelihood of competitive entry

¹⁰¹ USF/ICC Modernization Report and Order at ¶ 67.

is lower, ensuring the longevity of the public monopoly. Private firms, on the other hand, cannot credibly commit to predatory pricing and are constantly under threat of competition from new entrants.¹⁰²

Moreover, the cross-subsidization of below-cost pricing by public firms is often employed for the purpose of expanding output—bringing more customers under its control. Again, while this may sound good, where private broadband would otherwise already offer service and where public below-cost pricing would induce consumers to purchase services they don't need (and that might also come with undesirable non-price conditions like surveillance and free speech restraints), public provision of monopoly services can lead to greater social cost than competition or even private, monopoly provision of services.¹⁰³ As a result of these incentives, it turns out that public enterprises are actually *more* likely than their private counterparts to engage in anticompetitive conduct:

Even though they may be less concerned with generating profit, [government-owned enterprises] have stronger incentives than profit-maximizing firms to pursue activities that disadvantage competitors.¹⁰⁴

Finally, government-owned enterprises are generally exempt from antitrust scrutiny, and, even where relevant laws may apply, governments are far less likely to challenge the practices of entities they own than they are to challenge private firms.¹⁰⁵ As a result there is further reason to expect public enterprises to engage in anticompetitive conduct.

VII. If the FCC Preempts, It Should Make Clear that Preemption Would Not Apply to Laws Mandating Open Access for Government-Owned Networks

As we have discussed, we believe that the FCC should not preempt state laws restricting municipal broadband. But if the FCC does decide to intervene, it should do so in the least intrusive way possible, and in the manner most likely to encourage broadband deployment and competition (the stated goal of Section 706). Arguably that means requiring (or, at minimum, explicitly permitting) state laws mandating that government-owned networks be operated on

¹⁰² LOTT, *supra* note 51, at 64-68.

¹⁰³ *See id.* at 68-73. *See also* David E. M. Sappington & J. Gregory Sidak, *Anticompetitive Behavior by State-Owned Enterprises: Incentives and Capabilities*, in R. RICHARD GEDDES, *COMPETING WITH THE GOVERNMENT: ANTI-COMPETITIVE BEHAVIOR AND PUBLIC ENTERPRISES* 1-18 (2004).

¹⁰⁴ Sappington & Sidak, *supra* note 103, at 2.

¹⁰⁵ *See* Angela M. Diveley, *Clarifying State Action Immunity Under The Antitrust Laws: FTC v. Phoebe Putney Health System, Inc.*, 25 ST. THOMAS L. REV. 73, 75-84 (2012).

an open-access basis, such that private companies can lease part or all of the government-owned network to provide their own service. Some municipal broadband advocates have argued for exactly this result:

Community fiber, properly deployed and managed, can give at least some of us a way out. One particularly attractive model is called "open access." Under an open access model, the local municipality might be the owner of the fiber infrastructure, but agrees to lease access to the system to anyone on non-discriminatory terms. This opens up the possibility of having many local ISPs competing for your business over the same fiber infrastructure.¹⁰⁶

While open access mandates imposed on private companies are likely to undermine investment and thus harm consumers, open access mandates imposed on *government-owned networks* may be necessary to ensure that taxpayer construction of such networks does not crowd out private investment.

If Section 706 permits the FCC to preempt state rules at all, it does so only in order to

encourage the deployment on a reasonable and timely basis of advanced telecommunications capability *to all Americans*...in a manner consistent with the public interest...[by utilizing] measures that promote competition in the local telecommunications market.¹⁰⁷

However, as we have discussed, a local government deploying its own broadband wires does *not* encourage the deployment of advanced telecommunications "to all Americans," or even to those Americans living immediately outside its selected areas of deployment. In fact, because it would substitute ownership of a small-area network for a broader network that serves both well-served and under-served areas, government ownership of a broadband provider would likely *discourage* broader deployment and competition overall.

Because the FCC can preempt state laws prohibiting municipal broadband only if it does so in a manner that encourages further competition, preemption to facilitate this simple substitution would not be permissible under the statute. But it is possible that the FCC could intervene if doing so led to the creation of openly accessible conduit, openly accessible rights of way or

¹⁰⁶ Corynne McSherry & Brian Carver, *Hate Your ISP? Maybe You Need Community Fiber*, ELECTRONIC FRONTIER FOUND. (Jul. 31, 2014), <https://www.eff.org/deeplinks/2014/07/hate-your-isp-maybe-you-need-community-fiber>.

¹⁰⁷ 47 U.S.C. § 1302 (emphasis added).

even open access fiber—all forms of government intervention that would *facilitate* further competition.

The first step toward exercising this authority in a rational manner, of course, would be for the FCC to conduct a rulemaking laying out how government-owned networks can facilitate broadband competition, including consideration of mandated open access provisions.

In short, if the FCC does have such sweeping powers to intervene in state broadband regulations and the operation of municipal broadband, it must first determine that the specific manner of its intervention satisfies the clear goals of Section 706, the provision ostensibly authorizing its intervention in the first place. Anything less would be arbitrary and capricious and a gross abuse of the sweeping powers claimed by the FCC.

Importantly, such mandates should not and cannot apply to privately owned broadband networks. Municipal authorities have access to municipal bonds or other low-cost financing, taxes, assessments, and the like. They are not subject to market forces or beholden to shareholders, and they need not operate to maximize profits, but rather to support the government's "nonprofit" functions. Meanwhile, it is indisputable that private broadband providers have no such luxury and can invest only where they expect a sufficient return. Not only would mandating open access for private broadband deter investment, it would also be an illegal regulatory taking, insofar as it deprives private broadband providers of the revenue base they may need to sustain their deployment, especially to relatively unprofitable areas.

To be clear, we do not know that mandating open access for government-owned service would meet the requirements of Section 706—but neither does the Commission. Our point is that while preempting the statutes at issue here may well contravene the purpose of Section 706, there may be no such problem with the FCC acting to preference open access government networks or networks with some other form of limited government ownership (assuming, *arguendo*, that Section 706 is actually an independent grant of authority in the first place). It is incumbent upon the Commission to determine whether any sort of limitation on government ownership is required, and to ensure that its intervention leads to that outcome rather than what is effectively a blank check for municipal broadband build-out—regardless of the actual effect on the public interest.

In other words, if the FCC insists on preemption, it may not simply preempt just *any* state laws that restrict municipal broadband networks, because some of these laws (including the laws at issue in this proceeding) almost certainly in fact encourage private deployment. Instead, it may preempt state laws *only* to the extent that they prohibit certain forms of government networks (like *open access* municipal networks) that might, in fact, encourage further broadband

deployment on the whole. The dividing line between these scenarios has not been explored, and serving the public interest requires a much more nuanced approach.