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Communications

Municipal Broadband

The FCC clearly lacks authority to preempt state laws that restrict municipal broadband deployment as it has promised to do next week, writes author Lawrence J. Spiwak of the Phoenix Center for Advanced Legal & Economic Public Policy Studies. While some may try to give legal cover to the FCC's intended action, Spiwak says the dearth of authority is so extreme that the FCC's stance amounts to little more than political showmanship.

Why the FCC Can't Preempt States on Muni-Broadband

BY LAWRENCE J. SPIWAK

Emboldened by a direct request of the White House, the Federal Communications Commission at its next Open Meeting is expected to grant the petition of the City of Chattanooga Tennessee to preempt a state law that restricts municipal broadband deployment.¹ Putting aside the policy merits of municipal broadband for the moment, there is only one small problem regarding the Commission's upcoming vote: As I detailed in a piece I wrote for BLOOMBERG BNA last summer, the FCC has absolutely no legal authority to

preempt state laws that restrict or prohibit municipal broadband deployment.²

That said, BLOOMBERG BNA recently ran a commentary by attorney Nicholas Miller, who contends that the FCC does indeed possess the authority the Supreme Court has concluded it does not.³ While I would encourage everyone to read my earlier analysis for themselves, let me summarize the current state of the law quickly here before turning to Mr. Miller's arguments.

The FCC's Only Preemption Authority: Section 253

One of the boldest provisions in the Telecommunications Act of 1996 was Section 253, which provided the Commission with the then-new and narrow authority to preempt state laws and regulations. Under Section 253(a), "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."⁴ (Emphasis supplied.) If the FCC determines

¹ Fact Sheet: *Broadband That Works: Promoting Competition & Local Choice In Next-Generation Connectivity*, The White House, Office of the Press Secretary (January 13, 2015) (available at: <http://tinyurl.com/ks2eyod>); Statement by Chairman Tom Wheeler on Community Broadband (February 2, 2015) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0202/DOC-331805A1.pdf).

Lawrence J. Spiwak is the President of the Phoenix Center for Advanced Legal & Economic Public Policy Studies (www.phoenix-center.org), a non-profit 501(c)(3) research organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.

² Lawrence J. Spiwak, *FCC Has No Authority to Preempt State Municipal Broadband Laws*, BLOOMBERG BNA (Aug. 11, 2014) (154 DER B-1, 8/11/14).

³ Nicholas P. Miller, *FCC Should Use Scalpel, Not Ax to Preempt State Laws Limiting Muni-Broadband*, BLOOMBERG BNA (Feb. 12, 2015) (29 DER B-1, 2/12/15).

⁴ 47 U.S.C. § 253(a).

that a “State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a)” then the “Commission shall preempt ... to the extent necessary. . . .”⁵ Using this authority, the Commission has a successful track record of preempting state laws and regulations which have deterred entry for private-sector network deployment.⁶

Seizing upon the language of Section 253(a), in 2001 proponents of municipal broadband argued that because municipal providers are an “entity,” the Commission should preempt those laws which restrict municipal broadband deployment. While there was tremendous political pressure to preempt state legislatures at the time, a Democrat-controlled Commission unanimously (albeit “reluctantly”) ruled that the agency lacked any legal authority to preempt such laws.⁷

Undeterred, proponents of municipal broadband appealed the Commission’s rejection all the way to the United States Supreme Court in the case of *Nixon v. Missouri Municipal League*.⁸ The Court, however, agreed with the Commission, finding that Section 253 does not provide the agency with preemption authority in this instance.

To begin, the Court went out of its way to note that “it is well to put aside” the public policy arguments favoring municipal broadband to support any “generous conception of preemption.” Why? Because the issue of preemption is one of statutory interpretation and, as such, “the issue does not turn on the merits of municipal telecommunications services.”⁹ This holding is critical and helpful in sniffing out weak arguments for preemption. In essence, the Court determined that it matters not how sweet municipal broadband can be made to sound, nor how bountiful its alleged benefits—as a matter of Constitutional law, the FCC has no legal authority to preempt state laws restricting or prohibiting municipal broadband.

Indeed, the Court’s rationale for rejection was straightforward: “[F]ederal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power. . . .”¹⁰ Thus, reasoned the Court, permitting preemption in this circumstance “would come only by interposing federal authority between a State and its municipal subdivisions, which our

precedents teach, ‘are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.’ ”¹¹

A New Theory: Section 706

Despite this defeat in *Nixon*, proponents of municipal broadband have spent the last decade trying to find an alternative legal theory of preemption and, with the D.C. Circuit’s recent ruling in *Verizon v. FCC*,¹² believe they now may have finally found one—namely, the FCC’s authority in Section 706 of the Communications Act.¹³ Given the court’s ruling in *Verizon*, FCC Chairman Tom Wheeler, a vocal proponent of municipal broadband,¹⁴ boldly stated last year that “I believe the FCC has the power—and I intend to exercise that power—to preempt state laws that ban competition from community broadband.”¹⁵ The Chairman has yet to offer any details on his legal argument.

Taking up Chairman Wheeler’s invitation, last summer the municipal provider in Chattanooga, Tennessee, filed a petition with the FCC to use its authority under Section 706 to preempt a Tennessee state law which, it claims, prevents it from expanding beyond its existing franchise territory.¹⁶ The White House, sensing political

¹¹ *Id.*

¹² *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

¹³ 47 U.S.C. § 1302. Section 706(a) states that the agency may use, “in a manner consistent with the public interest, convenience and necessity, . . . regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Section 706(b), in turn, states that if the Commission determines that advanced telecommunications capability is not “being deployed to all Americans in a reasonable and timely fashion”, the FCC “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” There is some debate whether Section 706(a) is independent from Section 706(b), which states that if the Commission determines that advanced telecommunications capability is not “being deployed to all Americans in a reasonable and timely fashion”, the FCC “shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.” While the agency once believed that Section 706(b) was required to trigger Section 706(a), the FCC reads the D.C. Circuit’s opinion in *Verizon* to mean that Sections 706(a) and 706(b) are independent grants of authority. For a full discussion, see Lawrence J. Spiwak, *What Are the Bounds of the FCC’s Authority over Broadband Service Providers?—A Review of the Recent Case Law*, 18 JOURNAL OF INTERNET LAW 1 (2015); George S. Ford and Lawrence J. Spiwak, *Justifying the Ends: Section 706 and the Regulation of Broadband*, 16 JOURNAL OF INTERNET LAW 1 (January 2013).

¹⁴ Tom Wheeler, *Removing Barriers to Competitive Community Broadband*, OFFICIAL FCC BLOG (June 10, 2014)(available at: <http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband>).

¹⁵ Remarks of Tom Wheeler, Chairman, Federal Communications Commission, before the National Cable & Telecommunications Association (April 30, 2014)(available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0430/DOC-326852A1.pdf).

¹⁶ *In the Matter of The Electric Power Board of Chattanooga, Tennessee* (filed July 24, 2014)(available at <https://www.epb.net/downloads/legal/EPB-FCCPetition.pdf>). With a speed generally unheard of for the Commission, four days

⁵ 47 U.S.C. § 253(b).

⁶ See, e.g., *In the Matter of the Public Utility Commission of Texas*, FCC 97-346, 13 FCC Rcd 3460, MEMORANDUM OPINION AND ORDER (rel. Oct. 2007).

⁷ *In re Missouri Municipal League*, FCC 00-443, 16 FCC Rcd 1157, MEMORANDUM OPINION AND ORDER (rel. January 12, 2001); Concurring Statement of William E. Kennard, *In re Missouri Municipal League*, *id.* (“We vote reluctantly to deny the preemption petition of the Missouri Municipals because we believe that HB 620 effectively eliminates municipally-owned utilities as a promising class of local telecommunications competitors in Missouri. Such a result, while legally required, is not the right result for consumers in Missouri. Unfortunately, the Commission is constrained in its authority to preempt HB 620 by the D.C. Circuit’s *City of Abilene* decision and the U.S. Supreme Court’s decision in *Gregory v. Ashcroft* that require Congress to state clearly in a federal statute that the statute is intended to address the sovereign power of a state to regulate the activities of its municipalities.”)

⁸ *Nixon v. Missouri Municipal League*, 541 U.S. 124 (2004).

⁹ *Nixon, id.*, 541 U.S. 131-32 (emphasis supplied).

¹⁰ *Id.* at 140.

gold, jumped on the bandwagon and incorporated by reference the Chattanooga petition as part of President Obama's 2015 State of the Union speech.¹⁷ And, as noted above, it is widely expected that the FCC will grant Chattanooga's petition at its February meeting.¹⁸

While we do not know the exact arguments the FCC will rely upon, some basic lawyering reveals three glaring infirmities (although I'm sure there are many more) in the argument that Section 706 gives the FCC the legal authority to preempt state laws regarding municipal broadband.¹⁹

Forbearance Does Not Equal Preemption

First, it is important to note that nowhere in Section 706 does any derivation of the word "preemption" appear—only the word "forbearance"—and there is a big legal difference between the two concepts.

To wit, Black's Law Dictionary defines the concept of forbearance simply as "refraining from action." In contrast, Black's defines preemption as the "doctrine adopted by the U.S. Supreme Court holding that certain matters are of such a national, as opposed to local character that federal laws preempt or take precedence over state laws." Given the Constitutional implications of preemption, therefore, there is a much higher legal standard to meet if an agency of the federal government would like to preempt a state law. Indeed, as the Supreme Court observed in *Wyeth v. Levine*, there are

two cornerstones of our pre-emption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"²⁰

So, given that Congress deliberately chose to exclude the term "preemption" from Section 706(a), it is difficult to see how the Commission's use of Section 706 to preempt state laws would reflect a "clear and manifest purpose of Congress."

In its pleading, Chattanooga seeks to side-step this point by arguing that "forbearance" falls under the vague language in Section 706 which permits the FCC to use "other regulatory methods that remove barriers

later the agency established its pleading cycle. See Public Notice: 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 (July 28, 2014)(available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0728/DA-14-1072A1.pdf).

¹⁷ See *supra* n. 1.

¹⁸ *Id.*

¹⁹ For a detailed exploration of the bounds of the FCC's authority under Section 706, see Lawrence J. Spiwak, *What Are the Bounds of the FCC's Authority Over Broadband Service Providers?*, *supra* n. 13; see also Lawrence J. Spiwak, *Understanding the Net Neutrality Debate: A Basic Legal Primer*, BLOOMBERG BNA (July 23, 2014).

²⁰ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citations omitted).

to infrastructure investment."²¹ Again, however, Chattanooga glosses over the key finding of Constitutional law in *Nixon*. As the Court observed, while the Commission has ample authority to preempt state laws and regulations that create barriers to entry for private entities, the Court in *Nixon* specifically held that "neither statutory structure nor legislative history [of Telecommunications Act of 1996] points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms." Thus, reasoned the Court, the "want of any 'unmistakably clear' statement to that effect is fatal" to any argument that Congress intended the FCC to have any authority to preempt state laws which restrict municipal broadband.²² By most accounts, I suspect, the "other regulatory methods" does not qualify as an "unmistakably clear" statement of preemption authority.²³

Any Use of Section 706 Must Be Tied to Specific Delegation of Authority

Another infirmity with the use of Section 706 to try to preempt state laws regarding municipal broadband results from the D.C. Circuit's holding in *Verizon* that "any regulatory action authorized by Section 706(a) [must] fall within the Commission's subject matter jurisdiction over such communications—a limitation whose importance this court has recognized in delineating the reach of the Commission's ancillary jurisdiction."²⁴ According to the D.C. Circuit's holding in *Comcast v. FCC*, this means that any use of Section 706 must be tied directly to a specific delegation of authority in "Title II, Title III, or Title VI. . ."²⁵ As Section 706 focuses on forbearance (and not preemption), we need to look at where Congress specifically delegated to the Commission its forbearance authority—namely, Section 10 of the Communications Act.²⁶ Given this logic, it should come as no surprise that the D.C. Circuit specifically held that as "contemplated by § 706 . . . [f]orbearance decisions are governed by the Communications Act's § 10. . ."²⁷

Well, guess what? **There is absolutely nothing in Section 10 which permits the FCC to preempt any state law or regulation.** To the contrary, Section 10 is limited to the FCC exercising forbearance only over its own implementation of certain portions of the Communications Act.²⁸

²¹ See Chattanooga Petition, *supra* n. 16 at pp. 38-42.

²² *Nixon*, *supra* n. 8, 541 U.S. at 141.

²³ Indeed, given the Constitutional law question at bar, it is important to recognize that *Nixon* did not involve a question of *Chevron* deference. Thus, a reviewing court is under no obligation to give the agency any deference to its likely argument that Section 706 provides the Commission with a separate source of preemption authority.

²⁴ 740 F.3d 623 at 639-40 (emphasis supplied).

²⁵ *Comcast v. FCC*, 600 F.3d 642, 654 (D.C. Cir. 2010)(emphasis supplied).

²⁶ 47 U.S.C. § 160.

²⁷ *Ad Hoc Telecommunications Users Committee v. FCC*, 572 F. 3d 903, 907 (D.C. Cir. 2009).

²⁸ Unfortunately, the Commission's use of its Section 10 authority has a rather sordid past. See, e.g., George S. Ford and Lawrence J. Spiwak, *The Impossible Dream: Forbearance After the Phoenix Order*, PHOENIX CENTER PERSPECTIVE No. 10-08 (December 16, 2010)(available at: <http://www.phoenix-center.org/perspectives/Perspective10-08Final.pdf>); George S. Ford and Lawrence J. Spiwak, *Section 10 Forbearance: Asking*

To the extent the Commission does have any direct preemption authority over state laws and regulations, **that authority rests exclusively in Section 253**. So, while the Commission has legitimately (and effectively) used this preemption authority to strike down state laws and regulations that prohibit private-sector broadband deployment, as noted above the Supreme Court in *Nixon* has conclusively held that the agency's Section 253 preemption authority does not extend to state laws that limit or prohibit municipal broadband. Thus, if—as *Verizon* and *Comcast* instruct—the Commission's use of Section 706 must be tied to a direct delegation of authority under Title II, Title II and Title VI, then it is unclear how the Commission may use Section 706 to preempt state laws which restrict or prohibit municipal broadband.

Section 706 Gives Co-Equal Jurisdiction to the FCC and State Commissions

Finally, proponents of the Section 706 preemption authority argument fail to grasp the most salient point about the way the statute is written: that is, *Section 706(a) provides co-equal jurisdiction to both the FCC and state commissions "with regulatory jurisdiction over telecommunications services" to encourage the deployment of broadband on a "reasonable and timely basis."*²⁹ (While one could argue that many states have legislated that their respective public utility commissions ("PUCs") may not impose price regulation, the fact that residual consumer protection and public safety regulations remain counts in my book as "regulatory authority.") Thus, because *Verizon* now gives the FCC the power to oversee broadband service providers under Section 706, then by extension *Verizon* also provides state PUCs with the same ability to regulate broadband service providers.³⁰

This co-equal authority under Section 706 raises a host of complicated questions with regard to preemption. Here are two hypothetical examples:

The Right Questions To Get The Right Answers, 23 COMM.LAW CONSP. 126 (2014) (available at: <http://scholarship.law.edu/commlaw/vol23/iss1/5>).

²⁹ For a full examination of this topic, see Lawrence J. Spiwak, *Federalist Implications of the FCC's Open Internet Order*, PHOENIX CENTER PERSPECTIVE NO. 11-01 (February 8, 2011) (available at: <http://www.phoenix-center.org/perspectives/Perspective11-01Final.pdf>). Chattanooga attempts to counter this argument by citing to an earlier draft of Section 706 which states that "Measures to be used include: price cap regulation, regulatory forbearance, and other methods that remove barriers and provide the proper incentives for infrastructure investment. The Commission may preempt State commissions if they fail to act to ensure reasonable and timely access." Chattanooga Pleading, *supra* n. 16 at p. 42, citing H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess., 1996 U.S.C.C.A.N. 10, 224-225, 1996 WL 46795 (Jan. 31, 1996) (emphasis supplied). However, the fact that this highlighted language was deliberately not included in the final draft, coupled with the fact that Section 706(a) clearly gives jurisdiction to both the "Commission and each State commission with regulatory jurisdiction over telecommunications services" (emphasis supplied) speaks volumes to the validity of Chattanooga's argument.

³⁰ A point already recognized widely among state commissioners. See Lawrence J. Spiwak, *NARUC Recap: Federalist Implications of Verizon v. FCC*, @LAWANDECONOMICS BLOG (February 20th, 2014) (available at: <http://phoenix-center.org/blog/archives/1825>).

In the first scenario, let's assume *arguendo* the FCC attempts to use Section 706 to preempt a state law restricting municipal broadband, but the local state PUC (exercising the same authority) says "go to hell." Who wins? My money is on the state PUC: if the FCC can't preempt using its direct authority under Section 253, then the chances of preemption using Section 706 against a state entity with co-equal jurisdiction are slim to none.

But there is more: Because the 1996 Act—as affirmed in *Verizon*—gives state PUCs the same authority under Section 706 as the FCC, if the FCC proceeds to use Section 706, then by extension a state PUC now has the ability to preempt a law passed by its own legislature if it determines that such a law deters broadband deployment. Clearly, when it comes to preemption, using Section 706 as legal authority would open a Pandora's Box of unintended consequences.

Throwing Spaghetti Against the Wall

As noted above, although the law on the FCC's preemption authority seems abundantly clear, there remains a strong interest in overcoming state laws governing a state's municipalities entering the highly risky telecommunications business. Given the strength of the precedent, getting around *Nixon* and the 1996 Act requires a great deal of inventiveness. BLOOMBERG BNA recently ran such a piece, authored by Nicholas Miller, who set forth three rather novel legal theories to support the FCC's use of Section 706.³¹ In fact, none of Mr. Miller's arguments are really legal theories, but merely new versions of the type of public policy arguments already labeled irrelevant to the preemption question by the Supreme Court.

Mr. Miller's first argument is what I can only describe as some sort of a "comity" argument. That is, Mr. Miller apparently believes that it is unfair that on the one hand the FCC has taken steps to restrict local governments' ability to hold up competitive cable franchises and siting applications for new cell phone tower construction for private providers (decisions, by the way, which were upheld in court³²), yet on the other hand the FCC to date has been reluctant to use its preemption authority against state laws that restrict or prohibit publicly-

³¹ *Supra* n. 3. Significantly, Mr. Miller readily concedes that "The FCC needs to avoid using § 253(a)."

³² *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b) to Ensure Timely Siting Review & to Preempt Under Section 253 State & Local Ordinances That Classify All Wireless Siting Proposals As Requiring A Variance*, DECLARATORY RULING, FCC 09-99, 24 FCC Rcd 13994 (rel. November 18, 2009), *aff'd* City of Arlington v. FCC, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S.Ct. 1863 (2013); see also *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, 2012 Biennial Review of Telecommunications Regulations, FCC 14-153, ___ FCC Rcd ___, REPORT AND ORDER (rel. October 21, 2014); and see *In re Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC 06-180, REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULE-MAKING, 22 FCC Rcd 5101 (rel. March 5, 2007); *aff'd Alliance For Community Media v FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 557 U.S. 904 (2009).

owned municipal networks (or, as Mr. Miller colloquially refers to it, “non-traditional ownership”) to provide a “competitive threat” to the private sector. Preempting such state laws, argues Mr. Miller, would essentially restore balance to the FCC’s use of preemption authority. Mr. Miller’s argument is simply a fairness claim and is, thus, a policy argument with no legal muscle. As the Court made clear in *Nixon*, Congress had a preference to promote private sector broadband deployment³³ and has no authority to tell an individual state what it can do with its political subdivisions. If municipal broadband is so important, then that debate is best had before individual state legislatures.

Mr. Miller’s second argument is that with the FCC’s pending (and highly controversial) decision to reclassify broadband Internet access as a common carrier telecommunications service under Title II of the Communications Act,³⁴ preempting state laws will allow the Commission to “use non-profit networks as ‘yardsticks’ to observe developments in the local broadband distribution market as ‘net neutrality’ rules are rolled out.” According to Mr. Miller, the

FCC needs a yard stick to segregate real from false claims about the on-going needs of broadband network providers: when are operator requirements legitimate network management and when are they anticompetitive efforts to disadvantage others? Publicly owned networks offer the necessary yardstick to compare terms of service, prices, and operational requirements.

With such disparate business models, there can be no meaningful comparison between the behaviors of government-owned and privately-funded broadband networks.

At the heart of Mr. Miller’s “yardstick” argument is the notion that government-owned networks’ motivations are pure and not merely profit-seeking, so the municipality’s behavior is the “gold standard” to which private sector providers should be compared regarding net neutrality compliance. Again, this is a policy argument, not a legal one, and so is entirely irrelevant to the legality of preemption. Moreover, the argument is silly. It is impossible to compare operational activities and re-

³³ According to the Progressive Policy Institute, private sector telecom and cable companies invested over \$46 billion dollars in capital expenditures in 2013. See Diana G. Carew and Michael Mandel, *U.S. Investment Heroes of 2014: Investing at Home in a Connected World*, Progressive Policy Institute (September 2014) (available at: <http://tinyurl.com/nwz22jm>). Given that the *raison d’être* of Section 706 is to promote broadband deployment, some might think it a odd policy choice to attempt to use that same statute to permit government to crowd-out private sector investment.

³⁴ *Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, Federal Communications Commission (February 4, 2015) (available at: http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0204/DOC-331869A1.pdf).

quirements with private-sector providers when (a) muni-networks typically benefit from huge spill-over effects (some legitimate, some perhaps not) from their electric monopolies; (b) muni-networks can often recover broadband costs from captive electric ratepayers; (c) local governments have the ability to impose taxes on citizens to pay for these networks (regardless of whether they want municipal broadband or not); and (d) most municipal networks were build using huge cash infusions from the Federal Government.³⁵ (Indeed, Mr. Miller repeatedly concedes that municipal networks have received billions of dollars in federal subsidies courtesy of the American Recovery and Reinvestment Act of 2009.) With such disparate business models, there can be no meaningful comparison between the behaviors of government-owned and privately-funded broadband networks.

There is an aspect of the “yard stick” argument I find interesting, however, but purely from a policy perspective. If, as Mr. Miller presumes, the motivations of the municipal systems are “pure” or “purer” than those of the private sector broadband providers, then perhaps the FCC should look to the opinions of the municipal providers on the use of Title II to impose net neutrality regulations. In fact, the municipalities have already spoken on the matter—43 municipal networks, including Chattanooga, recently filed a letter with the Commission begging the agency not to reclassify broadband Internet access as a Title II common carrier telecommunications service because reclassification would “undermine the business model that supports our network, raises our costs, and hinders our ability to further deploy broadband.”³⁶ This argument parallels exactly the position of the private broadband provider, lending credibility to the “purity” of the view. I believe the “yardsticking” in this case to be relevant, but only with regard to reclassification. Such policy concerns do not influence the legality of preemption.

The FCC has no legal authority to consider whether a state legislature’s laws constitute “unreasonable discrimination” against municipal broadband providers.

Finally, to the extent I understand the argument, Mr. Miller contends that upon the FCC’s imminent decision to reclassify broadband Internet access as a Title II common carrier telecommunications service, state statutes which restrict municipal broadband “cause unreasonable and unjust discrimination in the availability of

³⁵ See generally, George S. Ford, *Why Chattanooga is not the “Poster Child” for Municipal Broadband*, PHOENIX CENTER POLICY PERSPECTIVE NO. 15-01 (January 20, 2015) (available at: <http://www.phoenix-center.org/perspectives/Perspective15-01Final.pdf>).

³⁶ See *Letter from 43 Municipal Utilities to FCC Chairman Tom Wheeler*, Ex Parte Submission, Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-12 (February 10, 2015) (available at: <http://apps.fcc.gov/ecfs/document/view?id=60001028443>).

broadband services” under Section 202 of the Communications Act. Given this purported “unreasonable and unjust discrimination,” Mr. Miller contends that the Commission can somehow “rely on the new net neutrality rules under Title II” as a basis of preemption under Section 706.

Mr. Miller’s argument has a slight subject-matter jurisdiction problem. That is to say, Section 202 dictates that a common carrier’s rates, terms and conditions must not be “unreasonably discriminatory.”³⁷ Under the plain terms of the Communications Act, a “common carrier” is defined as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy. . . .”³⁸ And the Communications Act defines a “person” as “an individual, partnership, association, joint-stock company, trust, or corporation.”³⁹ So, while a municipal broadband provider may be a common carrier (and therefore subject to the dictates of Title II), the last time I checked state legislatures are not “common carriers” and, as such, are not bound by FCC enforcement of Section 202 of the Communications Act when they pass laws regarding the scope of authority of their political subdivisions. Put

simply, the FCC has no legal authority to consider whether a state legislature’s laws constitute “unreasonable discrimination” against municipal broadband providers.

Conclusion

At its February meeting, FCC is expected to preempt a Tennessee state law which governs the ability of the state’s political subdivisions to enter the telecommunications business. Legal scholars give the decision a near 100 percent probability of being rejected by the courts, suggesting the FCC’s action is little more than political showmanship.⁴⁰

The Supreme Court has made clear that the relationship between a state and its subdivisions goes well beyond the FCC’s jurisdiction, and nothing has changed in that regard. Certainly, Mr. Miller’s recent arguments offer nothing new or compelling. Nevertheless, given the Constitutional law at stake, I fully expect this issue to go back to the Supreme Court for resolution. And at the point, legal arguments—not political sophistry—will drive the decision.

³⁷ 47 U.S.C. § 202.

³⁸ 47 U.S.C. § 153(11).

³⁹ 47 U.S.C. § 153(39).

⁴⁰ See, e.g., Phoenix Center Teleforum: “*Federalism, Preemption and Municipal Broadband*” (January 22, 2015)(audio and slide presentations available at: <http://youtu.be/1836VjjJTc0>).