

NOTE

Casting a Wider 'Net: How and Why State Laws Restricting Municipal Broadband Networks Must Be Modified

*Jeff Stricker**

ABSTRACT

*One of Congress's purposes in passing the Telecommunications Act of 1996 was to encourage the widespread deployment of broadband Internet. As municipalities began constructing their own broadband networks, private sector Internet service providers, alarmed at the prospect of competing with these public networks, pushed back with lobbying campaigns encouraging states to enact laws prohibiting these municipal networks. This, in turn, slowed broadband deployment, particularly in areas that private providers believed to be unprofitable (and thus left unserved). Municipalities challenged these laws under the Telecommunications Act, arguing that the Act preempted the state laws, but the Supreme Court in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), upheld the state prohibitions, clearing the way for even more states to adopt such prohibitions. Today, twenty-one states have statutes restricting municipal networks, leaving many Americans without affordable broadband Internet access.*

*This Note argues that Congress should amend the Telecommunications Act to overcome *Missouri Municipal League* and preempt state laws restricting municipal broadband network deployment. Through preemption, state legislatures will be forced to revise or repeal overly restrictive statutes, paving the way for more reasonable restrictions that balance the importance of af-*

* J.D., expected May 2013, The George Washington University Law School; B.A., Political Science, 2008, The George Washington University. My thanks to Professor Mandy Hitchcock and Jason Madden for their guidance and encouragement in crafting this Note.

fordable broadband with the need to protect private companies from direct competition with publicly funded entities. This Note next analyzes selected provisions of current state laws and proposes either to eliminate them as overly restrictive, modify them to be less restrictive, or retain them. The result is a framework of a balanced state law that protects private sector interests while also encouraging broadband deployment.

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INTRODUCTION

A few years ago, Michael and Amy Tiemann decided to build and operate a cutting-edge recording studio in Pittsboro, North Carolina,¹ a rural town of 3,555 people.² In addition to the high startup costs of the studio, such as sophisticated equipment, Mr. Tiemann discovered that establishing a broadband Internet connection to the studio was one of the greatest challenges of the project because the area around the studio lacked broadband infrastructure.³ “I spent more than two years begging Time Warner [Cable] to sell me a service that costs 50 times more than it should,” he explained, “and that’s after I agreed to pay 100 percent of the installation costs for more than a mile of fiber [optic cable].”⁴ Mr. Tiemann was fortunate enough that his career path as a pioneer in computer software development provided him with the capital necessary to afford such installation.⁵ But most Pittsboro residents do not have the same financial resources as Mr. Tiemann, given that the median family annual income is merely \$63,411.⁶

Mr. Tiemann and others like him faced immense difficulty in obtaining broadband in part because North Carolina passed House Bill 129, titled “Level Playing Field/Local Government Competition,” in May 2011.⁷ Without that law, Mr. Tiemann and other businesses and residents of Pittsboro might have worked together with their local government to find a solution to their lack of broadband access, possibly by way of a municipal broadband network that could provide service at an affordable rate.

The North Carolina statute “essentially barr[ed] [municipal broadband networks] from the consumer market,” leaving Mr. Tiemann and others similarly situated across North Carolina with no al-

¹ Monica Chen, *Chapel Hill’s High Hopes for Broadband Quashed by Law*, TRIANGLE BUS. J. (June 17, 2011), <http://www.bizjournals.com/triangle/print-edition/2011/06/17/chapel-hills-high-hopes-for-broadband.html?page=all>.

² U.S. CENSUS BUREAU, *2006-2010 American Community Survey 5-Year Estimates: Demographic and Housing Estimates*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP05 (last visited July 25, 2012).

³ Chen, *supra* note 1.

⁴ *Id.*

⁵ *About Us*, MANIFOLD RECORDING, <http://www.manifoldrecording.com/people.php#michael> (last visited Jan. 11, 2013). While Mr. Tiemann’s finances are not discussed, based on his impressive career it is safe to assume that Mr. Tiemann possessed sufficient resources to accomplish his goals.

⁶ U.S. CENSUS BUREAU, *2006-2010 American Community Survey 5-Year Estimates: Selected Economic Characteristics*, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP03 (last visited July 31, 2012).

⁷ H.B. 129, Gen. Assemb., 2011 Sess. (N.C. 2011), 2011 N.C. Sess. Laws 84 (codified at N.C. GEN. STAT. § 160A-340 (2012)).

ternative but to continue to beg Time Warner and other Internet service providers (“ISPs”) for service, usually at great cost to the consumer.⁸ Where, as in Mr. Tiemann’s case, the local telecommunications provider is clearly reluctant to enter a small unserved market at a reasonable price for consumers, a public network might be able to provide broadband Internet at an affordable rate.

Mr. Tiemann’s problem is not unique to North Carolina. In fact, when North Carolina’s bill passed in May 2011,⁹ nineteen states already had enacted legislation restricting or banning municipal broadband networks to the detriment of underserved communities.¹⁰ Such legislation has been a point of contention between private telecommunications companies and residents and businesses in underserved communities with, or seeking to build, municipal broadband networks. In North Carolina, Governor Bev Perdue declined to take a concrete position on the bill when she refused to sign or veto it (resulting in its enactment).¹¹ Governor Perdue explained, “My concern with House Bill 129 is that the restrictions the General Assembly has imposed on cities and towns who want to offer broadband services may have the effect of decreasing the number of choices available to their citizens,” and she urged the legislature to reconsider the law.¹²

State restrictions similar to North Carolina’s leave underserved municipalities caught in a bind: the private sector is unwilling or unable to provide sufficient broadband access at an affordable price, but the municipality is effectively prohibited from building its own network to compensate for the private sector’s refusal to enter the market. Consequently, residents and businesses in the vast majority of these municipalities are denied broadband Internet access, severely limiting their ability to conduct business and enjoy the many benefits broadband Internet offers.¹³

This Note argues that many current state laws which prohibit or effectively prohibit municipal broadband networks will continue delaying high-speed Internet access to individuals and businesses in un-

⁸ Chen, *supra* note 1.

⁹ 2011 N.C. Sess. Laws 84.

¹⁰ John Blevins, *Death of the Revolution: The Legal War on Competitive Broadband Technologies*, 12 YALE J.L. & TECH. 85, 110 (2009).

¹¹ Rob Christensen, *Perdue Urges Rethinking of New Broadband Law*, NEWS & OBSERVER (Raleigh, NC), May 21, 2011, at 3B.

¹² Press Release, Office of Governor Bev Perdue, Governor Perdue’s Statement on House Bill 129 (May 20, 2011), <http://www.governor.state.nc.us/NewsItems/PressReleaseDetail.aspx?newsItemID=1861>.

¹³ See *infra* Part I.B.

derserved communities, causing negative social and economic impacts.¹⁴ To reduce delays in broadband deployment, state regulations should reasonably protect the private sector from government-funded competitors when such competition is likely to take place, but should also granting municipalities leeway to construct broadband networks when the private sector is unable or unwilling to provide service at reasonable rates.

This Note proposes specific provisions that states choosing to regulate municipal broadband networks should include in their regulations to protect private industry. This Note also highlights some existing state law provisions that should be stricken because they are overly protective of the private sector to the detriment of consumers.

To effect timely modification of overly restrictive state laws, this Note further proposes that the federal government take action. The most effective means of changing existing state rules is to use § 253(a) of the Telecommunications Act of 1996¹⁵ to preempt state laws which prohibit or effectively prohibit municipalities from operating broadband networks. In order to overcome preemption, states with overly burdensome regulations would be forced to revise their laws to be less restrictive. However, the Supreme Court has interpreted § 253(a) in such a way that preemption is impossible at present.¹⁶ Thus, this Note proposes that Congress amend § 253(a) with language making clear its application to laws targeting municipal entities (and not just private entities).

Part I of this Note sets the stage for the discussion by defining key technical terms, laying out the parameters of the substantive debate, and explaining the present state of affairs at both the federal and state levels. Part II presents this Note's two-pronged solution: Section A addresses how federal preemption can compel states to repeal or revise overly restrictive laws, and Section B evaluates existing state laws, highlighting some that should be modified or repealed. Part III contains additional justifications for this Note's proposed solutions beyond those presented in Part II, including the economic and social benefits of municipal broadband and how municipally-sponsored broadband deployment mirrors other successful municipal infrastructure deployments in this nation's history. Finally, Part IV identifies and rebuts potential counterarguments to the proposed solution.

¹⁴ See *infra* Part I.B.

¹⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, § 101, 110 Stat. 56, 70 (codified at 47 U.S.C. § 253(a) (2006)).

¹⁶ See *infra* Part I.F.

I. THE LEXICON, LIMITS, AND LAW OF THE DEBATE

A. Terminology and Availability of Broadband

Before exploring the substantive issues, some fundamental terminology must be defined and parameters must be established. “Broadband” is a relatively vague term without a generally accepted definition. Commonly thought of as Internet connections faster than dial-up, broadband is often understood in terms of speed. In 1999, the Federal Communications Commission (“FCC”) defined broadband as an Internet connection capable of minimum speeds of 200 kilobits per second for both download (from the Internet to the user’s computer) and upload (from the user’s computer to the Internet).¹⁷ Eleven years later, the FCC decided the prior definition was outdated and adopted a new definition requiring download speeds of at least four megabits per second and upload speeds of at least one megabit per second.¹⁸ The FCC considers these speed benchmarks to be the “minimum speed required to stream a high-quality . . . video while leaving sufficient bandwidth for basic web browsing and email,” or, put another way, the FCC now considers this standard Internet usage.¹⁹

Under such a definition, the FCC estimates that out of 3230 counties in the United States, 1024 of them completely lack broadband service, resulting in about 24 million Americans without broadband access.²⁰ Moreover, these unserved areas, often rural, are typically far less densely populated than the national average population density.²¹ The FCC concluded that “broadband is not being deployed to all Americans in a reasonable and timely fashion,” and, most critically, that “market forces alone are unlikely to ensure that the unserved minority of Americans will be able to obtain the benefits of broadband anytime in the near future.”²²

¹⁷ 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, 25 FCC Rcd. 9556, 9558 (July 20, 2010).

¹⁸ *Id.* at 9559. Using the International System of Units, one megabit is the equivalent of 1,000 kilobits, i.e., one megabit per second is the equivalent of 1,000 kilobits per second. See *The NIST Reference on Constants, Units, and Uncertainty*, NAT’L INST. OF STANDARDS & TECH., <http://physics.nist.gov/cuu/Units/prefixes.html> (last visited Jan. 12, 2013).

¹⁹ 25 FCC Rcd. at 9559.

²⁰ *Id.* at 9570.

²¹ *Id.* at 9571–72 (explaining that the average household density of the unserved counties is 46.8 households per square mile as compared to the average U.S. county, which has a household density of 108.2 households per square mile).

²² *Id.* at 9574.

B. *The Need to Stay Wired*

While wireless networks are one option in broadband deployment, this Note only considers wire-based networks for three reasons. First, wired networks tend to offer faster speeds and more reliable connections than wireless systems because the shortage of wireless spectrum prevents wireless systems from offering connections with comparable speed and reliability.²³ Second, wireless broadband networks are subject to greater FCC regulation than wired networks, making them more difficult to build and operate.²⁴ Third, municipal wireless broadband can serve as both a primary and secondary source of broadband access and in many cases has taken on the latter character.²⁵ Such secondary source public networks are immaterial to this Note because they exist as a feature of convenience for residents in areas that already have broadband access.²⁶ For these reasons and others, wired systems are preferable even considering the greater cost in bringing them to unserved communities.²⁷

The benefits of high-speed Internet to both ordinary citizens and businesses are numerous and linked directly to broadband's greater speeds. For individuals, broadband performs critical functions such as assisting people in finding employment and facilitating communication and education in addition to offering great convenience and entertainment value.²⁸ Broadband also gives businesses the ability to expand their operations globally, find more and better customers and

²³ See Alex Goldman, *The FCC Decision and the Use of White Spaces*, WIRELESS INTERNET SERV. PROVIDERS ASS'N (Oct. 12, 2010, 8:30 AM), <http://web.archive.org/web/20110718180958/http://www.wispa.org/?p=3146> (accessed by searching for <http://wispa.org/?p=3146> in the Internet Archive index) (explaining that lack of radio spectrum availability and interference from nearby spectrum pose great challenges for companies seeking to offer wireless broadband); see also *WiMAX Offers Less Bang Than Fiber, Panelists Say*, COMM'NS DAILY, Mar. 31, 2009, available at 2009 WLNR 6205749 [hereinafter *WiMAX Offers Less Bang*] (explaining that wireless broadband cannot support a large number of users without losing speed and reliability).

²⁴ See Goldman, *supra* note 23 (discussing impact of FCC's power usage restrictions and "height above average terrain" antenna restrictions on wireless Internet services providers).

²⁵ Catherine A. Middleton, *A Framework for Investigating the Value of Public Wireless Networks* 10 (Aug. 15, 2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2118153.

²⁶ See *id.* at 16–17. Because wireless broadband is technologically inferior to wired Internet options, those who are willing to pay for Internet connectivity are "highly unlikely to subscribe to public Wi-Fi as their primary source of Internet connectivity if other options are available." *Id.* See generally Sharon E. Gillett, *Municipal Wireless Broadband: Hype or Harbinger?*, 79 S. CAL. L. REV. 561 (2006) (discussing municipal wireless broadband networks).

²⁷ See *WiMAX Offers Less Bang*, *supra* note 23.

²⁸ *The Benefits of Broadband*, OFFICIAL ST. OF MICH. WEBSITE, http://www.michigan.gov/broadband/0,1607,7-250-48184_48185--,00.html (last visited Aug. 26, 2012).

suppliers, streamline operations, advertise more efficiently, and recruit employees.²⁹ The result is a substantial net benefit to the community, as communities with high-quality broadband networks are more likely to attract and retain businesses, offer greater educational opportunities, provide government services more efficiently, and attract tourists.³⁰ Speed is key, as slower, non-broadband Internet connections render most of these benefits unobtainable either because of the time required to access the benefits or because the Internet products and services cannot be transmitted to users lacking broadband access.³¹

C. *The Expense of Expansion*

Although broadband is critical to individuals and businesses nationwide, Internet Service Providers (“ISPs”) are reluctant to enter more remote or less populated markets.³² Put simply, it is quite expensive to build out a wired broadband network.³³ The nature of wired broadband deployment requires large up-front costs of construction, essentially capital expenditures,³⁴ as broadband connections require running wires to customers’ homes or businesses.³⁵ However, once these up-front deployment costs are paid, the network is relatively cheap to operate.³⁶ Thus private ISPs price their service above transmission costs so as to recoup their capital outlay.

From a business standpoint, this sort of capital expenditure is more easily justified in densely populated areas, as the more densely populated an area is, the more customers there are within range of the network and available to pay for it.³⁷ Consequently, major metropolitan areas tend to have multiple private ISPs offering broadband ser-

²⁹ *Id.*

³⁰ *Id.*

³¹ *Getting Broadband*, FED. COMM’N. COMM., <http://www.fcc.gov/guides/getting-broadband> (last visited Nov. 8, 2012).

³² Richard Bennett & Robert D. Atkinson, *ITIF Analysis of FCC Broadband Deployment Report*, INFO. TECH. & INNOVATION FOUND. (July 21, 2010), <http://www.itif.org/publications/itif-analysis-fcc-broadband-deployment-report>.

³³ *Id.* (discussing “the high cost of bringing wireline broadband to remote areas,” and explaining “[i]t’s very difficult to justify a ten mile trench or hundreds of new telephone poles just to reach a single cattle ranch”).

³⁴ See David Clark, *A Simple Cost Model for Broadband Access: What Will Video Cost? 2* (Aug. 27, 2008) (unpublished manuscript), <http://cfp.mit.edu/publications/docs/DDC.Cost.analysis.TPRC.R1.pdf>.

³⁵ See *id.* at 6 (estimating the costs of connecting the ISP to the user’s premises).

³⁶ See *id.* at 7 (estimating that data transmission costs, exclusive of network connection, might fall somewhere in the ten to twenty cents per gigabyte range).

³⁷ See Bennett & Atkinson, *supra* note 32.

vice, because ISPs can more quickly recover their fixed costs of construction from the larger customer base.³⁸

However, in less densely populated areas, the fixed costs will either take longer to offset³⁹ or require that a higher price be charged to customers.⁴⁰ Using these principles, private ISPs can calculate the likely profitability of expanding to unserved markets and determine whether it is worth expanding to serve the market.⁴¹ Unfortunately, the more isolated and less densely populated the area, the less likely it is that the fixed costs of construction will ever be recouped, and thus such areas remain unserved.⁴²

D. The New Hope of Municipal Broadband

Faced with these unforgiving economic realities, municipalities with large unserved areas began developing plans to create broadband networks, embracing their potential to “help bridge the digital divide” where private ISPs refused to offer service.⁴³

One particularly successful municipal broadband project is in Cedar Falls, Iowa, where the local public utility, Cedar Falls Utilities (“CFU”), began selling fiber-optic broadband service in 1996.⁴⁴ While the project took eight years to become relatively cash-flow neutral,⁴⁵ in both 2008 and 2009, CFU’s communications network had operating income of approximately \$2.37 million, a figure which climbed to nearly \$3 million in 2010.⁴⁶

While one city’s example is no guarantee that all municipal networks will enjoy financial success, successful projects like CFU indicate that the municipal broadband idea is at least economically feasible. The benefits of affordable broadband access are so important to a community that making a profit should not be the overarch-

³⁸ *See id.*

³⁹ This assumes a smaller customer base paying the same price as a large customer base.

⁴⁰ *See Bennett & Atkinson, supra note 32.*

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See Blevins, supra note 10, at 105 (internal quotation marks omitted).*

⁴⁴ MICHAEL J. BALHOFF & ROBERT C. ROWE, BALHOFF & ROWE, LLC, MUNICIPAL BROADBAND: DIGGING BENEATH THE SURFACE 35–36 (Sept. 2005), <http://www.balhoffrowe.com/pdf/Municipal%20Broadband—Digging%20Beneath%20the%20Surface.pdf>.

⁴⁵ *Id.* at 36.

⁴⁶ Balance Sheet, Mun. Commc’ns Util. of the City of Cedar Falls, Iowa 1 (2011), <http://auditor.iowa.gov/reports/1123-0046-C000.pdf>. CFU provided both cable television and broadband Internet services over its network. *Id.*

ing goal.⁴⁷ The main purpose of municipal broadband should be to provide an increasingly necessary public service, not turn a profit.

E. The Private Sector Strikes Back to Curb Municipal Broadband

Fearing encroachment upon their traditional territorial domination, their ability to expand at their own pace, and their ability to choose which customers they will serve, private ISPs were quick to begin an aggressive campaign against municipal networks.⁴⁸ The campaign included lobbying for state laws restricting or banning such municipal networks as well as lawsuits to stifle their development.⁴⁹

While all of the private ISPs' efforts are too extensive to list here, two are worth noting. First, the Wisconsin legislature approved a state-sponsored broadband network planned primarily for educational purposes.⁵⁰ The University of Wisconsin was supposed to manage the network and sell service to other schools throughout the state.⁵¹ However, before the build-out of the network got very far, a group of thirty independent incumbent Wisconsin private ISPs (the same ISPs that declined to serve many potential customers for the state-sponsored project) filed multiple lawsuits and petitioned the Governor to delay and prevent the network's construction.⁵² Delayed for over a year now, the project remains trapped in administrative and judicial limbo.⁵³

The second example comes from Pennsylvania where private ISPs staged a massive lobbying campaign that amassed nearly \$5.3 million in fees for registered lobbyists between 2003 and 2004.⁵⁴ Of that sum, over \$3.1 million came from Verizon Communications, Inc. alone.⁵⁵ The lobbying effort paid off for the private ISPs: in late 2004 the state legislature passed a law prohibiting new municipal broadband projects⁵⁶ subject only to certain highly restrictive exceptions.⁵⁷

⁴⁷ See *infra* Part II.B.

⁴⁸ See Blevins, *supra* note 10, at 107–08.

⁴⁹ See *id.* at 107 (“Simply put, incumbent broadband providers used law to stifle municipal broadband in its infancy.”).

⁵⁰ See *Wisconsin Local Operators Seek to Block Stimulus Funded Broadband Project*, COMM’NS DAILY, Aug. 31, 2011, available at 2011 WLNR 17510498.

⁵¹ See *id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ D. Stan O’Loughlin, *Preemption or Bust: Fear and Loathing in the Battle over Broadband*, 28 CARDOZO L. REV. 479, 491 (2006).

⁵⁵ *Id.* Verizon had previously spent less than \$500,000 politicking during the prior three state election cycles. *Id.*

⁵⁶ 66 PA. CONS. STAT. § 3014(h) (2012).

In addition to Pennsylvania and Wisconsin, private ISPs were successful in persuading a number of other states to pass laws preventing municipalities from constructing broadband networks.⁵⁸ The watershed battle in the fight to legislate municipal broadband out of existence took place in Missouri.

F. Missouri Municipal League *and* § 253(a) Preemption

In 1997, Missouri passed a law which effectively⁵⁹ prohibited a “political subdivision” of the state from selling telecommunications services or facilities to public or private ISPs.⁶⁰ In response, a group of Missouri municipalities, municipally-owned utilities, and municipal organizations petitioned the FCC for a declaration that the statute was preempted by § 253 of the Telecommunications Act of 1996.⁶¹

Specifically, the petitioners asked the FCC to find that the Missouri statute violated § 253(a) of the Telecommunications Act, which states, “No State or local statute . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”⁶² Under § 253(d), the FCC is empowered to “preempt the enforcement of such statute . . . to the extent necessary to correct such violation or inconsistency” with § 253(a).⁶³

The FCC determined that the Telecommunications Act did not preempt the Missouri statute because the term “any entity,” as used in the statute, was not intended to include Missouri’s own political subdivisions.⁶⁴ Although the FCC found in favor of the state, the FCC made it clear that its decision was only following binding legal precedent.⁶⁵ Perhaps more importantly, the FCC’s opinion stated that the policy behind the Missouri statute was in conflict with the goal of the

⁵⁷ See *infra* Part II.B.3.

⁵⁸ See Blevins, *supra* note 10, at 109–10.

⁵⁹ One of the exceptions is that a municipality may sell telecommunications service only to private ISPs on a “nondiscriminatory, competitively neutral basis, and at a price which covers cost” as though the municipal network were acting as a private, for-profit entity. MO. REV. STAT. § 392.410(7) (2012). However, due to the narrowness of the exceptions and the fact that the law effectively foreclosed municipalities from building broadband networks, the Supreme Court deemed these exceptions “not pertinent” in preemption analysis. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 129 n.1 (2004).

⁶⁰ MO. REV. STAT. § 392.410(7) (2012).

⁶¹ *Mo. Mun. League*, 541 U.S. at 129.

⁶² 47 U.S.C. § 253(a) (2006).

⁶³ *Id.* § 253(d).

⁶⁴ *Mo. Mun. League*, 16 FCC Rcd. 1157, 1158 (2001), *vacated*, 299 F.3d 949, 952 (8th Cir. 2002), *rev'd*, 541 U.S. 125 (2004).

⁶⁵ *Id.* at 1162.

Telecommunications Act to promote broadband deployment, especially in rural areas.⁶⁶

The municipalities scored a victory, though, when their appeal to the Eighth Circuit resulted in a unanimous reversal of the FCC's decision.⁶⁷ The appellate court held that the plain meaning of the words "any entity" included municipalities, despite the heightened standards imposed when federal law preempts a state's regulation of its own political subdivisions.⁶⁸

But the victory was short lived: less than two years later, the Supreme Court overturned the Eighth Circuit and upheld the Missouri statute's validity for four reasons.⁶⁹ First, a state law regulating municipalities cannot be preempted because the municipality is not a separate entity from the state under the meaning of "entity" in § 253.⁷⁰ Second, even if the Missouri statute were preempted, municipalities would not inherently have the authority to build telecommunications networks absent a grant of such authority from the state.⁷¹ The first and second reasons lead to the third: even if the statute was preempted and authority to build the network existed, the state could simply cut off funding for the network's construction or maintenance via budgeting decisions.⁷²

⁶⁶ *Id.* ("[T]he legal authorities that we must look to in this case compel us to deny the Missouri Municipals' petition The Commission has found that municipally-owned utilities and other utilities have the potential to become major competitors in the telecommunications industry. In particular, we believe that the entry of municipally-owned utilities can further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities." (footnotes omitted)).

⁶⁷ The procedure of preempting a statute under § 253(a) begins with a party petitioning the FCC for preemption. The FCC then renders a decision on preemption which is reviewable by the applicable United States Circuit Court of Appeals for the jurisdiction in which the state law was challenged. In this case, that Circuit Court was the Eighth Circuit. *See Mo. Mun. League*, 299 F.3d 949, 951–52.

⁶⁸ *Id.* at 952–53.

⁶⁹ *See Mo. Mun. League*, 541 U.S. at 128–29.

⁷⁰ *Id.* at 134 ("[W]hen a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what may be done by the government itself (including its subdivisions) will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command.").

⁷¹ *Id.* at 135 ("But what if the FCC did preempt the restriction? The municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business.").

⁷² *Id.* at 136 ("Surely there is no contention that the Telecommunications Act of 1996 by its own force entails a state agency's entitlement to unappropriated funds from the state treasury, or to the exercise of state bonding authority.").

Finally, the Court expressed concern that preemption would create a “national crazy quilt” of states where such networks were legal in some states and illegal in others.⁷³ States that had previously granted municipalities the authority to build such networks would be preempted if they tried to revoke that authority by legislation, but states that had never granted such authority in the first place could validly ban municipal networks.⁷⁴ The “crazy quilt” would not only be confusing, but would also be the product of federal law as opposed to “free political choices” at the state level.⁷⁵

In the aftermath of *Missouri Municipal League*, the private sector intensified its efforts to eliminate municipal broadband networks. ISPs initiated enforcement actions in states with existing legislation regulating municipal broadband networks and increased lobbying efforts to have regulations passed in states without them.⁷⁶ Private ISPs also launched a publicity campaign, using media outlets to portray municipal networks as anticompetitive.⁷⁷ More importantly, the timing of these efforts (and the new legislation which resulted) was significant for the private ISPs, as many municipalities were in the process of planning and financing broadband projects nationwide.⁷⁸

Thanks in large part to the substantial lobbying effort discussed above, at least twenty-one states have some sort of legislative barrier to municipal broadband networks.⁷⁹ Of these twenty-one, Arkansas,⁸⁰ Missouri,⁸¹ Nebraska,⁸² and Texas⁸³ have total prohibitions on new municipal networks. And while all of the states’ restrictions vary in their comprehensiveness, they all limit the availability of reliable

⁷³ *Id.*

⁷⁴ *Id.* at 137 (“A State or municipality could give the power, but it could not take it away later[.] . . . for the law expressing the government’s decision to get out [of the telecommunications business] would be preempted.”).

⁷⁵ *Id.* at 136.

⁷⁶ Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 98 (2009).

⁷⁷ See O’Loughlin, *supra* note 54, at 490.

⁷⁸ See Blevins, *supra* note 10, at 109.

⁷⁹ See *id.* at 110 (noting that at least nineteen state legislatures have created barriers to entry on municipal broadband). Since Blevins wrote in 2009, two other states have enacted restrictions on municipal broadband. See 2011 N.C. Sess. Laws 84; 2012 S.C. Acts 284.

⁸⁰ ARK. CODE ANN. § 23-17-409(b) (2012). This statute provides a small exception for pre-existing city-owned electric utilities or “television signal distributors” to operate data networks. *Id.* § 23-17-409(b)(2).

⁸¹ MO. REV. STAT. § 392.410(7) (2012).

⁸² NEB. REV. STAT. § 86-594 (2012).

⁸³ TEX. UTIL. CODE ANN. § 54.201 (West 2011).

broadband Internet access to citizens in their respective underserved communities.⁸⁴

II. THE TWO-PRONGED SOLUTION

Though this Note does not dispute that the free market should govern when ISPs are willing to compete, ISPs should not be able to suppress competition in markets they have no intention of entering even if that competition comes from a public entity. But the line between cases where the ISPs are legitimately nervous about their ability to compete with municipal networks or where they simply want to suppress any and all forms of competition is often difficult to discern. In the municipal broadband context, there has been a strong lobby led by the private ISPs against municipal networks expressing a legitimate fear that the private sector will be unable to compete effectively with publicly subsidized or funded broadband networks.⁸⁵ But there has been a relatively strong outcry against state laws prohibiting municipal networks from both ordinary citizens⁸⁶ and the federal government.⁸⁷ For example, in May 2011 FCC Commissioner Michael Copps spoke at a telecommunications conference in North Carolina, imploring all states to stop and reverse the trend of prohibiting municipal broadband networks.⁸⁸

Despite no clear consensus regarding the value of direct competition between the private sector and municipalities in the consumer broadband market, there is a workable compromise that will quickly get underserved communities municipal broadband Internet access while protecting private ISPs' economic interests. This Note highlights new and amended statutory provisions that would further two critical purposes of municipal broadband networks: (1) to incentivize private ISPs to expand their networks more rapidly, alleviating the need for municipal networks, and (2) to fill the remaining gaps in service that the private ISPs are unwilling to enter even when faced with the prospect of losing potential customers to municipal networks. To achieve this goal, legislation should make municipal networks permissible when circumstances are such that the private sector is unwilling to provide broadband service at reasonable rates.

⁸⁴ See *infra* Part II.B.

⁸⁵ See *supra* Part I.E.

⁸⁶ See, e.g., Chen, *supra* note 1.

⁸⁷ Ted Gotsch, *Copps Calls on States to Allow Municipalities to Offer Broadband*, TR DAILY, May 10, 2011, available at 2011 WLNR 9347480.

⁸⁸ *Id.*

This Note proposes a two-pronged solution. At the federal level, Congress should amend § 253 so that it applies expressly to public entities, thus overruling *Missouri Municipal League* by granting the FCC the power to declare overly restrictive state laws preempted. Such federal action would force state legislatures either to reconsider their laws or simply stand by as the overly burdensome state laws are preempted. At the state level, this Note identifies provisions of current state laws which have particularly important effects on municipalities' ability to construct and operate broadband networks and discusses how those provisions should be modified or eliminated.

A. *The Federal Prong: Amending § 253 per Missouri Municipal League*

Because the industry lobby has proven so strong even in the face of public opposition,⁸⁹ it is unlikely that states will suddenly begin resisting lobbying efforts and reverse their restrictive laws. Thus, proposals for modifying state laws alone are insufficient to exact any meaningful change. Accordingly, the best way to compel states to reconsider their statutes is to have federal law preempt those state laws which effectively prohibit public entities from providing telecommunications services. However, in light of *Missouri Municipal League*, federal action is now necessary for preemption to occur.

There are two viable options to overcoming *Missouri Municipal League*: the Supreme Court could overturn its own precedent or Congress could amend § 253 to meet the requirements set out by *Missouri Municipal League* and reach the state statutes in question. Although either remedy would suffice, this Note focuses on the congressional solution.⁹⁰

1. *The Proposed Amendment to § 253(a)*

Congress should amend § 253(a) so that it expressly applies to states and their own political subdivisions. To illustrate this point, consider the following (the bold text is added to the current language

⁸⁹ North Carolina is a prime example, as the issue was so contentious that the Governor refused to sign or veto the bill. *See supra* Introduction.

⁹⁰ The fact is that eight Justices felt the language of § 253 is not clear enough to hold that preemption applied to statutes affecting public entities, so it is unlikely the Court would change its tune and side with Justice Stevens if the matter arose again. Given the relative ease with which Congress could remedy the statute's flaw to the Court's satisfaction, a congressional solution is best. Moreover, a discussion arguing the merits of overturning the Court's majority opinion would require delving into an entirely separate area of law, state sovereignty, which would detract from the primary focus of this Note.

of § 253(a)): “No State or local statute . . . may prohibit or have the effect of prohibiting the ability of any entity, INCLUDING PUBLIC ENTITIES, to provide any interstate or intrastate telecommunications service.”⁹¹ Including some form of the term “public entities” in the statute, a phrase borrowed from *Missouri Municipal League*,⁹² would overcome the Court’s conclusion that “Congress used ‘any entity’ with a limited reference to any private entity,” and thus expressly include the state laws discussed in this Note under the “preemption net” of § 253.⁹³

2. *The Need for an Amendment to § 253(a)*

Amending § 253 in this way would likely sway the votes of at least two members of the majority still on the Court today, Justices Scalia and Thomas, who concurred in the judgment because § 253(a) “simply does not provide the clear statement which would be required . . . for a statute to limit the power of States to restrict the delivery of telecommunications services by their political subdivisions.”⁹⁴ The two even agreed with the majority’s conclusion that preemption “would have several unhappy consequences” but did not feel “that the avoidance of unhappy consequences is adequate basis for interpreting a text.”⁹⁵

The majority opinion also put heavy emphasis on this state sovereignty issue and the statutory language necessary to overcome it.⁹⁶ Though it also relied on policy justifications, the majority opinion concluded “that § 253(a) is hardly forthright enough” due to “[t]he want of any ‘unmistakably clear’ statement” in § 253(a) that it applies to public entities.⁹⁷

In his dissenting opinion, Justice Stevens argued that such an amendment is unnecessary, as he found the majority’s conclusion that “any entity” includes all entities except for “*municipally owned* entities” incorrect.⁹⁸ Justice Stevens argued that the majority’s interpreta-

⁹¹ 47 U.S.C. § 253(a) (2006). The bold text is not part of the statute and was added merely for illustrative purposes. It is not intended to be any sort of formal or concrete proposal for how exactly to amend the language of § 253(a).

⁹² *Nixon v. Mo. Mun. League*, 541 U.S. 125, 132–33 (2004).

⁹³ *See id.* (stating in part that “public and private” is often used “when both are meant to be covered”).

⁹⁴ *Id.* at 141 (Scalia, J., concurring).

⁹⁵ *Id.*

⁹⁶ *Id.* at 140–41.

⁹⁷ *Id.*

⁹⁸ *Id.* at 143 (Stevens, J., dissenting).

tion had to be based on one of the assumptions that either Congress did not know public utilities existed or that it purposefully disregarded public utilities in drafting § 253, and that both assumptions are “manifestly implausible” based on the great number of public utilities in the country.⁹⁹

Justice Stevens pointed out another flaw in the majority’s reasoning, highlighting another section of the Telecommunications Act of 1996 that contains a more narrowly tailored definition of “utility.”¹⁰⁰ The Pole Attachments Act¹⁰¹ specifically excludes entities “owned by the Federal Government or any State” from its definition of “utility,”¹⁰² and the term “State” includes “any political subdivision, agency, or instrumentality,” of the state.¹⁰³ It is thus unlikely that Congress intended to restrict § 253 not to apply to public entities because elsewhere in the Telecommunications Act Congress specifically addressed public entities when it wished to treat them differently.¹⁰⁴

While Justice Stevens’s argument is compelling, it is of little help as a practical matter given that the other eight Justices felt differently.¹⁰⁵ Thus, an amendment to § 253 is necessary if there is to be a significant chance for state-level reform via preemption. However, even if § 253 is amended, it is possible that the Supreme Court might invalidate the amended version on policy grounds, as the six-Justice majority opinion also expressed a number of concerns with the potential efficacy of such an amendment in practice¹⁰⁶—concerns now ripe for discussion.

3. *Responding to Further Preemption Concerns*

An amendment to § 253 might still face difficulties in the Supreme Court, as the six-Justice majority opinion went beyond the textual issue, reasoning that there would be minimal positive effects from preemption because states would remain free to restrict municipal networks by denying municipalities the authority to construct them.¹⁰⁷

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 143–44.

¹⁰¹ 47 U.S.C. § 224 (2006).

¹⁰² *Id.* § 224(a)(1).

¹⁰³ *Id.* § 224(a)(3).

¹⁰⁴ *Mo. Mun. League*, 541 U.S. at 143–44 (Stevens, J., dissenting).

¹⁰⁵ *See generally id.* at 128–41 (majority opinion).

¹⁰⁶ *See id.* at 133–40 (discussing hypothetical scenarios and criticizing the dissent’s positions).

¹⁰⁷ *See id.* at 134 (“[P]reempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place.”).

Even without a law banning such networks, municipalities would still need the power to build them, as “freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business.”¹⁰⁸

However, this argument is insufficient as a basis for refusing to allow preemption for two reasons. First, as Justice Stevens pointed out in his dissenting opinion, § 253(a) preempts laws that impinge on the “ability” of an entity to enter the telecommunications business, and the state laws at issue here most certainly inhibit the ability of municipalities to enter the market even in the absence of authority to enter (because even should that authority be granted, the law would prohibit entry).¹⁰⁹ Justice Stevens then extended this argument to say that § 253 prevents states from revoking authority already granted to municipalities, as such revocation would be equally prohibitive of an entity’s ability to enter the market as would a law banning municipal networks.¹¹⁰ But those states which had not yet granted municipalities the authority to construct or operate broadband networks would be under no obligation to do so as a result of § 253, even in its hypothetically amended version.¹¹¹

This leads to one of the majority’s primary policy arguments: that the result of preemption would be a “national crazy quilt” of states, some of which would permit municipal networks and others that did not grant municipalities authority to operate such networks.¹¹² Justice Stevens countered this argument with the simple yet astute observation that failure to preempt statutes prohibiting municipal networks has the same effect, as a “national crazy quilt” of states with and without such inhibitive statutes would be allowed to exist.¹¹³ As Justice Stevens put it, “That the ‘crazy quilt’ . . . is the product of political choices made by Congress rather than state legislatures renders it no more absurd than the ‘crazy quilt’ that will result from leaving the matter of municipal entry entirely to individual States’ discretion.”¹¹⁴ Indeed Justice Stevens’s prediction has proven quite accurate, as the

¹⁰⁸ *Id.* at 135.

¹⁰⁹ *See id.* at 145 (Stevens, J., dissenting).

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Id.* at 136 (majority opinion).

¹¹³ *Id.* at 145–46 (Stevens, J., dissenting).

¹¹⁴ *Id.* at 146 (citation omitted).

twenty-one states that have passed such legislation vary greatly in their levels of prohibition.¹¹⁵

Moreover, the majority's practical assessment of the situation is contrary to that of the FCC, as even the majority recognized that the FCC "denounced the policy behind the Missouri statute" because it "substantially disserved the policy behind the Telecommunications Act."¹¹⁶ The majority opinion intentionally "put[s] aside" the position of the FCC in this regard, though, as "it does not follow that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business," and the value of municipal broadband is not relevant to the resolution of the issues presented in the case.¹¹⁷

The policy arguments the majority opinion advances are difficult to embrace due to the opinion's conscious disregard for the benefits of municipal broadband. Furthermore, even the majority's legal policy arguments (e.g., the national crazy quilt) are unavailing. Justice Stevens recognized the majority's mistake in this regard when he noted that preemption under § 253 is not automatic but rather hinges on a case-by-case determination to be made by the FCC.¹¹⁸ The FCC's role in preemption determinations would avoid the majority's "hypothetical absurd results"¹¹⁹ because the FCC can consider all the issues of each case (including both the general and legal policy issues) before making a determination. Justice Stevens argued, "Rather than assume that the FCC will apply . . . [§ 253] improperly," the better solution is to allow preemption of state laws applying to public entities and permit the FCC to make its determinations.¹²⁰

With preemption as a possible available remedy, the next Section addresses the second prong of the proposed solution: the substantive analysis of existing state law provisions and how to modify them to achieve the purposes of municipal broadband networks.

¹¹⁵ See *supra* text accompanying notes 79–84. See generally *infra* Part II.B (discussing various approaches and laws which restrict municipal broadband networks).

¹¹⁶ See *Mo. Mun. League*, 541 U.S. at 130–31. The position of the FCC was that municipal broadband networks would "further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential." *Id.* at 131.

¹¹⁷ *Id.* at 131–32.

¹¹⁸ See *id.* at 147 (Stevens, J., dissenting).

¹¹⁹ *Id.*

¹²⁰ See *id.* at 147–48.

B. *The State Prong*

With many state laws restricting municipal broadband networks in different ways and to different degrees, a comprehensive, one-size-fits-all solution to meet any one state's particular circumstances is a pipedream. Instead, this Note focuses on a number of specific provisions contained in some states' laws, explaining how those provisions can be improved or why they should be done away with entirely. To clarify how each provision discussed should be treated, this Section is subdivided into three subparts: (1) provisions to eliminate, (2) provisions to modify, and (3) provisions to retain.

The provisions to eliminate include outright bans and wholesale service restrictions. The provisions to modify include those raising municipal entry costs, those restricting public financing, those mandating referenda, those restricting pricing and cross subsidies, and those imposing a number of other operating restrictions. Those provisions which should be retained in essentially their current form include those mandating feasibility studies before construction, those mandating appeals to the private sector to provide broadband service before construction, and those exempting unserved areas from many of the restrictions.

1. *Provisions to Eliminate*

There are two major restrictions present in state laws that should be phased out entirely from any legislation regulating municipal broadband: outright bans on municipal networks and restrictions limiting municipal networks to only wholesale service sales. These restrictions are overly prohibitive of municipal entry to the broadband consumer market and thus should not be included in legislation.

a. *Outright Bans*

Arkansas, Missouri, Nebraska, and Texas all have total bans on municipal networks.¹²¹ Such total bans are patently repugnant to the spread of broadband service, as they remove municipalities from the list of potential entrants to the market. Or, in § 253's framework, total bans are the most prohibitive of an entity's ability to enter the market.¹²² Therefore, such total bans should be entirely eliminated.

The impact of a total ban is twofold. First, the ban prevents municipalities from providing the critical broadband service their citizens

¹²¹ See *supra* notes 80–83.

¹²² 47 U.S.C. § 253 (2006).

demand and may even require. Second, the ban may delay the expansion of private ISP broadband networks to unserved areas by removing municipalities as potential entrants to the broadband market.¹²³ Laws preventing the entire class of public entities from entering the broadband market discourage private ISPs from expanding more aggressively, if they choose to expand at all, because there is no threat that a municipal provider will be first to reach an untapped market.¹²⁴ Thus, such total bans should be scrapped in their entirety.

b. Wholesale Service Restrictions

Another troubling type of restriction that should be eliminated is found in Washington and Nevada, where public utilities are only allowed to sell telecommunications service wholesale, not to end users.¹²⁵ Although the law in Nevada prohibits cities with populations exceeding 25,000 from selling telecommunication service to the “general public,” municipalities below 25,000 are apparently free to construct their own networks.¹²⁶ In theory, even those cities governed by the statute can construct and maintain certain telecommunication facilities so long as the services those facilities provide are not sold to the general public.¹²⁷ The theory behind this type of restriction is that the municipality invests in the infrastructure and maintains it but must then contract out the retail sale of such service to private parties.¹²⁸ The goal is to keep the private sector involved and allow for some competition between retailers to help keep prices reasonable for consumers.¹²⁹

However, such restrictions have proven contrary to the quest for broadband expansion. While the municipal infrastructure can be helpful, the additional steps between investment and service provision

¹²³ Mo Xiao & Peter F. Orazem, *Entry Threat and Entry Deterrence: The Timing of Broadband Rollout* 25 (NET Institute, Working Paper No. 07-09, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1025121 (“[T]he mere threat of entry may alleviate market power associated with oligopolistic market structure . . .”).

¹²⁴ *See id.* (“In industries such as telecommunications services, our results imply that policies encouraging entry will play an important role in determining the timing of the provision of new services to local markets.”).

¹²⁵ WASH. REV. CODE § 54.16.330 (2012); NEV. REV. STAT. § 268.086 (2012).

¹²⁶ NEV. REV. STAT. § 268.086.

¹²⁷ *See* William Lehr et al., *Broadband Open Access: Lessons from Municipal Network Case Studies 10–13* (Sept. 2004) (unpublished manuscript), http://people.csail.mit.edu/wlehr/Lehr-Papers_files/Lehr%20Sirbu%20Gillett%20Broadband%20Open%20Access.pdf (explaining the options available to a municipality in wholesale-only jurisdictions and their implications for competition).

¹²⁸ *See id.*

¹²⁹ *See id.*

add uncertainty and expense to the mix, which can make the project less appealing to municipalities.¹³⁰ In fact, Washington's legislature is currently considering proposed legislation to permit public entities to sell telecommunications services directly to consumers.¹³¹ The bill explains that unserved and underserved areas have persisted under the roughly seven years of the wholesale-only restriction and that the aim in removing the restriction is to speed the deployment of broadband service to those areas.¹³² The bill grants municipalities the ability to operate networks with a great deal of autonomy and limited restraints and is currently under active consideration with hearings held as recently as mid-January 2012.¹³³

While such wholesale-only restraints have apparently failed in Washington, there may be valid reasons for a municipality to impose such a restraint on itself in building a network in some cases. Just as there should not be a requirement that municipalities only sell broadband service wholesale, there also should be no requirement that they only sell broadband service at retail. Instead, each municipality should remain free to weigh its options in light of its unique circumstances, as in some cases a municipality's self-imposed restraint of wholesale-only sales may be appropriate. Such a self-imposed restraint may be useful in enticing private ISPs' cooperation in the project, rather than having the private ISPs view the project as a threat and seek to block it. Using such a self-imposed restraint as an incentive for cooperation with the private sector could avoid much of the fighting that tends to derail or increase the cost of municipal broadband projects. Despite this provision's potential utility in some municipal contexts, a statewide requirement that all municipal networks sell service only wholesale is overly broad and restrictive. Consequently, these bans should be removed leaving the choice to municipalities.

2. *Provisions to Modify*

This Section presents five categories of restrictions that certain states have enacted that, with some modifications, are not unduly re-

¹³⁰ See *id.* at 27 ("Open access can only work if private companies find it in their interest to act as 3rd-party service providers . . .").

¹³¹ See *Bill Information: HB 1711*, WASH. ST. LEGISLATURE, <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1711&year=2011> (last visited Jan. 16, 2013).

¹³² H.B. 1711, 62d Leg., 1st Spec. Sess. (Wash. 2011) ("In an effort to reach those areas of the state that are unserved or underserved, it is the intent of the legislature to grant public utility districts the authority to provide retail telecommunications services, including broadband . . .").

¹³³ See *Bill Information: HB 1711*, *supra* note 131.

restrictive of municipal networks: (1) restrictions which raise municipal entry costs into the broadband market, (2) restrictions on the use of public financing, (3) mandatory referenda, (4) restrictions on pricing and cross-subsidies, and (5) operating restrictions.

a. Raising Municipal Entry Costs

One legislative tactic to impede municipal networks is to add procedural requirements to the approval process that require time and expense to complete, thus raising the costs for a municipality attempting to construct a network. For example, Pennsylvania only allows municipalities to build their own networks if they obtain permission to do so from local incumbent telecommunications service providers.¹³⁴ If the incumbent declines to provide the requested service, the municipality may then construct its network.¹³⁵ Based on the terms of the statute, though, a local incumbent could theoretically delay the project by as much as fourteen months without successfully providing comparable service.¹³⁶

The danger here is the potential for delay. At a minimum, a private incumbent not interested in providing service can simply run the clock for two months before the municipality can advance its planning and construction. Such delays can erode popular support for the public network or allow the incumbent additional time to exert political pressure at varying levels to derail the project. Worse still, the lack of penalties for incumbents who fail to provide the promised service leaves the door open for incumbents to act in bad faith. With the potential for delays and interference so great, the power over potential municipal networks in Pennsylvania has shifted almost fully to the incumbent private companies (even those not currently providing broadband service).

The likelihood of delays and hardships in dealing with the incumbents in this all-or-nothing way significantly raises entry costs for municipalities. Asking an incumbent for permission seems counterproductive, as it essentially asks the incumbent to give up some of its potential customers in the future, an unlikely outcome. Thus, the re-

¹³⁴ 66 PA. CONS. STAT. § 3014(h) (2012).

¹³⁵ *See id.* § 3014(h)(2).

¹³⁶ *See id.* After a municipality submits a written request to the local incumbent, the incumbent has two months to opt to provide the data speeds requested to the area. Should the incumbent opt to provide the service requested, it has fourteen months from the date the request was made in which to build out the network. The statute makes no mention of penalties or other repercussions for incumbents who choose to provide the service and fail to do so within the fourteen months.

quirement of permission from a local incumbent should be done away with and replaced with something more like North Carolina's mandatory appeal to the private sector.¹³⁷

Florida's law raises entry costs for municipalities by requiring that each municipality develop a detailed business plan to "ensure that revenues exceed operating expenses and payment of principal and interest on debt within 4 years."¹³⁸ But four years is a relatively short period in which to turn cash-flow positive given the great expense of investing in infrastructure and the relatively long life such telecommunications systems are expected to serve.¹³⁹

Moreover, the goal of municipal networks is to provide a critical service that the private sector has failed to provide, and thus, like other critical public services, the focus should be on delivering the service quickly, even if this means it takes longer to become cash-flow positive. How a municipality chooses to prioritize recoupment of its investment (i.e., the length of time, if ever, over which it expects to become cash-flow positive) should be determined by the municipality based on the exigencies of its particular situation.

However, the requirement of a business plan is not a provision that should be eliminated altogether. This requirement forces a municipality to look critically and objectively at the economic realities its network will impose upon the municipality, and requires the city to come up with a plan that will provide the service at a bearable cost. Thus, while the four-year restriction is overly burdensome, mandating that municipalities present some sort of a business plan (such as the feasibility studies Utah requires¹⁴⁰) is a provision worth maintaining.

b. Restrictions on Public Financing

Restrictions on public financing for municipal networks are another tool used to impede the spread of municipal networks. For example, one of Florida's restraints requires special votes by elected representatives to approve the issuance of debt if the debt is to mature after fifteen years.¹⁴¹ A more onerous example exists in North Carolina, where at least two public hearings must be held on the project before the municipality may apply to the state for permission to use

¹³⁷ See *infra* Part II.B.3.b.

¹³⁸ FLA. STAT. § 350.81(2)(c)(4) (2012).

¹³⁹ Cf. *supra* Part I.D (explaining the Cedar Falls, Iowa case and its eight-year path to cash-flow neutrality).

¹⁴⁰ See *infra* Part II.B.3.a.

¹⁴¹ FLA. STAT. § 350.81(2)(e)(2).

public financing.¹⁴² The state then conducts an independent review of the application before deciding whether to approve it.¹⁴³ As part of the review process, the public entity bears the burden of persuasion on all relevant issues, and the state will consider the “probable net revenues” of the project and issue a written report on the “reasonableness of the [public entity’s] revenue projections.”¹⁴⁴ These requirements in North Carolina are in addition to the municipality prevailing in a special election on whether the city should build the network in the first place.¹⁴⁵

While there is certainly good reason for states to hold municipalities accountable for the debt they plan to incur, requirements that are as procedurally complex and difficult to navigate as North Carolina’s serve largely to defeat the ability of municipalities to build networks. Florida’s fifteen-year restriction, while somewhat arbitrary, is at least reasonable in that it simply requires an elected board to approve long-term debt without unduly restricting shorter-term debt. North Carolina, though, puts numerous hurdles between a municipality and its ability to build a network, including multiple public hearings, a referendum, and an application to the state. As discussed earlier,¹⁴⁶ even if successful on all the substantive matters, the delays a municipality faces in navigating the approval processes can be fatal to a network plan.

Consequently, states must walk a fine line when crafting legislation. While at face value North Carolina’s restrictions seem harmless and well-intentioned in calling for public involvement and multiple levels of review, such redundancy and excessive scrutiny has tremendous efficiency costs and makes building municipal networks far less feasible. And while a bright line is difficult to draw, the Florida restraint is certainly preferable to North Carolina’s in furthering the purposes of municipal broadband. Ideally states would go no further than a requirement that debt plans be included in some sort of overall business plan or feasibility study that must be presented prior to the municipality’s governing body voting on whether to go forward with construction.¹⁴⁷

¹⁴² N.C. GEN. STAT. § 159-175.10 (2012).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* § 160A-340.4. See *infra* Part II.B.2.c for further discussion of these referenda.

¹⁴⁶ See *supra* Part II.B.2.a.

¹⁴⁷ Compare *supra* Part II.B.2.a, with *infra* Part II.B.3.a.

c. Mandatory Referenda

Some states have forced municipalities to prove that their citizens are on board with the network project before the project can proceed via mandatory local referenda. In addition to North Carolina,¹⁴⁸ Louisiana¹⁴⁹ and Colorado¹⁵⁰ are two such jurisdictions. Louisiana requires that, absent local rules to the contrary, a petition calling for a vote—signed either by fifteen percent of or ten thousand qualified electors, whichever is less—must be submitted within 180 days of submission of the project’s feasibility study.¹⁵¹ Alternatively, Colorado requires only that the ballot describe the “nature of the proposed service, the role that the local government will have in provision of the service, and the intended subscribers of such service.”¹⁵²

Here, again, arises the problem of excessive procedural hurdles. The only unique feature of telecommunications service provision by a government entity as compared to other government-provided services (such as electricity, water, sewers, and roads) is that the telecommunications industry is today predominantly administered by the private sector.¹⁵³ Therefore, where municipal governments see their entry as beneficial to the public interest in the telecommunications realm, the municipalities should not be subject to additional burdensome proofs of public approval above those the municipality would face in undertaking a project in any of the other aforementioned areas.

If local government is competent to make decisions in those other fields without state-level interference, there appears to be no good reason for a state to require a referendum in the telecommunications field.¹⁵⁴ These referenda serve only to further delay and potentially derail a project, as they present a prime opportunity for the private sector lobby to court voters. Special rules mandating referenda that

¹⁴⁸ See *supra* text accompanying notes 142–44.

¹⁴⁹ LA. REV. STAT. ANN. § 45:844.50 (2012).

¹⁵⁰ COLO. REV. STAT. § 29-27-201 (2012).

¹⁵¹ LA. REV. STAT. ANN. § 45:884.50(G)(1).

¹⁵² COLO. REV. STAT. § 29-27-201(2).

¹⁵³ O’Loughlin, *supra* note 54, at 484. One could argue that Internet service is a service best provided by local government, just as these other services already are. See *id.* at 487–88 (“According to proponents of ‘municipal broadband,’ these community-owned networks are a natural outgrowth of traditional municipal functions such as the building and maintaining of infrastructure and the providing of public services.”).

¹⁵⁴ In fact, the North Carolina statute considers the local government competent enough to determine when the public network should be sold or shut down, as the public entity “shall not be required to obtain voter approval . . . prior to the sale or discontinuance of the city’s communications network.” N.C. GEN. STAT. § 160A-340.1(b) (2012).

apply only to municipal broadband are thus inappropriate, but if a state has legislation that requires a referendum for any major municipal infrastructure project the referendum would not necessarily be unfair. In deciding whether to require a referendum, laws should treat municipal broadband projects the same as any other municipal infrastructure project.

d. Pricing and Cross-Subsidy Restrictions

State regulations can also include two key financial constraints on municipal networks, namely that service must be priced at or above cost and that the municipality may not cross-subsidize the public network via other city revenue sources. Both Florida¹⁵⁵ and North Carolina¹⁵⁶ have adopted such restrictions. The price restraints are designed to keep prices in line with what a private entity would charge so that municipalities cannot price out private competitors.¹⁵⁷ The cross-subsidy prohibition furthers the goal of preserving fair competition by preventing cost reductions (which could translate into price cuts) with revenues not associated with the service.¹⁵⁸

While both of these restraints serve a critical function in preserving private ISPs' ability to compete effectively, they also impede public network construction by making the public network less financially viable.¹⁵⁹ Assuming private ISPs refuse to enter the market because they do not believe they can provide service at a profit, or even at a break-even point, no municipality would be able to enter an unserved market given these restraints. The entire reason for municipal networks in unserved markets is to overcome the private sector's unwillingness to enter the market. These restraints preventing cross-subsidies force cities to make the networks at least cash-flow neutral within a certain time, as otherwise the funding for the network's operation would run dry. Similarly, forcing prices up to the levels of cash-flow neutrality would price out many potential customers, thus depriving them of the benefit the municipality seeks to provide.

Instead of imposing such requirements up front and indefinitely, the more prudent course of action is to impose these restraints only when private competition is reasonably certain to enter the market.

¹⁵⁵ FLA. STAT. § 350.81(2)(f) (2012).

¹⁵⁶ N.C. GEN. STAT. § 160A-340.1(a)(7).

¹⁵⁷ See O'Loughlin, *supra* note 54, at 488–89.

¹⁵⁸ See *id.*

¹⁵⁹ See Hannibal Travis, *Wi-Fi Everywhere: Universal Broadband Access as Antitrust and Telecommunications Policy*, 55 AM. U. L. REV. 1697, 1771 (2006).

One solution is thus to amend these provisions to apply only upon a private ISP notifying the municipality that it plans to provide service in the relevant market along with proof of such intent and a plan with an estimate of when entry is expected. The municipality would then face a deadline to bring its prices in line with costs and to eliminate cross-subsidies so that once a private ISP enters the picture, the competition between the two is fair. Such a solution allows for maximum broadband distribution yet also preserves the private sector's ability to penetrate markets served by public entities.

e. Other Operating Restrictions

An additional two key operating restraints face municipal networks in some states: advertising restrictions and tax collection requirements. North Carolina imposes both.¹⁶⁰ First, North Carolina municipalities cannot advertise public network service on "a public, educational, or governmental access channel if the city requires another communications service provider to carry the channel," nor can they use resources not accounted for in the public network's books to promote the services.¹⁶¹ Second, North Carolina's public networks must collect all applicable taxes and fees that a private ISP would collect and pay them to the relevant authorities, including the city's own general fund.¹⁶²

As with price and cross-subsidy restrictions,¹⁶³ imposing advertising and tax restrictions is best reserved until competition appears reasonably certain. While the advertising restriction alone is relatively minor, it is still an impediment to efficient distribution of service, as it needlessly adds costs in unserved markets. The local government should be able to take advantage of its unique resources, such as public-access channels, to distribute the service more cost-effectively because it more efficiently furthers the goal of the public network to provide an otherwise unavailable yet critically important service in high-speed Internet.

That same logic translates to tax collection. While the municipality should reasonably expect to collect and pass along taxes and fees to other authorities (such as the state and federal governments), there seems to be little purpose served in requiring the city to pay taxes to itself other than to benefit private ISPs by raising municipal networks'

¹⁶⁰ See N.C. GEN. STAT. § 160A-340.1(a).

¹⁶¹ *Id.* § 160A-340.1(a)(6).

¹⁶² *Id.* § 160A-340.1(a)(9).

¹⁶³ See *supra* Part II.B.2.d.

costs. Instead of collecting this revenue to pay to itself, it makes more sense to permit the city to pass along those tax savings to customers as a price reduction to encourage adoption (if the city so chooses). However, should a private ISP announce its intent and ability to enter the market, fairness dictates that the city begin collecting the relevant taxes in the interest of fair competition.

3. *Provisions to Retain*

The following three types of provisions are worth keeping mostly unchanged because they offer the private sector a fair level of protection from public competition without unfairly delaying or otherwise inhibiting municipal networks. The first restriction, which requires municipalities to conduct feasibility studies before beginning construction, forces cities to think critically and obtain an objective analysis of the various impacts, both positive and negative, that the project will likely have. The second seeks to avoid battles between the private sector and municipalities by requiring municipalities to solicit broadband service from the private sector before building its own network. The third provision is unique from those previously discussed in that it creates a safe harbor from the restrictions imposed for municipalities that qualify as unserved.

a. *Mandatory Feasibility Studies*

One rather beneficial procedural obstacle that Utah has adopted is the mandatory feasibility study.¹⁶⁴ Utah's law requires that an outside consultant be retained to conduct a feasibility study, which plays a central role in the city's decision-making process.¹⁶⁵ The feasibility study must meet certain requirements, such as explanations of the impact the city's provision of telecommunications service will have on competition in the market,¹⁶⁶ whether a private party would provide the service if the city failed to do so,¹⁶⁷ the costs of construction,¹⁶⁸ projected demand growth for the service,¹⁶⁹ and projected revenues and expenses for the next five years.¹⁷⁰

¹⁶⁴ UTAH CODE ANN. § 10-18-202(2) (LexisNexis 2012).

¹⁶⁵ *Id.* § 10-18-203.

¹⁶⁶ *Id.* § 10-18-203(2)(a)(ii).

¹⁶⁷ *Id.* § 10-18-203(2)(b)(ii).

¹⁶⁸ *Id.* § 10-18-203(2)(c)(i)–(ii).

¹⁶⁹ *Id.* § 10-18-203(2)(d)(ii).

¹⁷⁰ *Id.* § 10-18-203(2)(e)–(f).

Contrasted with requirements for cash-flow positivity, as exemplified by Florida's law,¹⁷¹ Utah's feasibility study seems greatly preferable because its mission is to educate the municipality's decision-makers about the potentially harsh realities the city will face in its endeavor, rather than to impose onerous requirements on the project that may serve to undermine the project's prospects for success. Insofar as Utah's requirement meets this educational goal, it should be retained.

The key difference between the Florida approach and the Utah approach is the impact each has on the prospects for the municipal network's success in providing service. The Florida approach sets a high bar for the project to meet in order to avoid some form of termination, whereas the Utah approach lays out specific factors that the study must examine so that a better-informed decision can be made in the first place. This leaves the ultimate decision in the city's hands, as Utah only requires that the feasibility study result in a finding that the project can generate sufficient revenues to operate cash-flow neutral in the mid- to long-run.¹⁷² While Utah's requirement of cash-flow neutrality may not be ideal, its imposition of a feasibility study remains a worthwhile one. Designed as an instrument to facilitate rational decision-making, the feasibility study is a highly valuable tool that states should require municipalities to invest in prior to deciding to construct a network.

b. Mandatory Private Sector Appeals

An innovative approach to resolving the public-private debate over municipal broadband is found in North Carolina's requirement that municipalities issue a request for proposals to private ISPs as part of the approval process.¹⁷³ Specifically, the city must make clear the nature and scope of broadband service it wants provided and explain what actions the municipality is prepared to take in facilitating service provision (e.g., subsidies, rights-of-way, tax incentives, etc.).¹⁷⁴ The municipality must then review the proposals it receives, considering "any relevant factors" including, but not limited to, technical matters, the proposer's experience in the market, and costs.¹⁷⁵

¹⁷¹ See *supra* Part II.B.2.a.

¹⁷² UTAH CODE ANN. § 10-18-202(3) (LexisNexis 2012).

¹⁷³ N.C. GEN. STAT. § 160A-340.6(a) (2012).

¹⁷⁴ *Id.* § 160A-340.6(b).

¹⁷⁵ *Id.* § 160A-340.6(d).

A defining characteristic of North Carolina's system is that the municipality is then entitled to negotiate contracts with "any responsible proposer," bargaining over the relevant factors in order to ascertain which proposal will best suit the city's demands.¹⁷⁶ Once the city concludes its negotiations with all proposers and selects the most favorable proposal, a sixty-day window opens during which the city and that private company must finalize a contract, after which the city may open negotiations with the next-best proposer.¹⁷⁷ Should the municipality fail to reach an agreement with the next-best proposer, it may build its own network.¹⁷⁸

On the one hand, this system suffers from the all-too-common flaw of adding procedural hurdles to the project, giving private ISPs the opportunity to needlessly delay the project simply by interacting for the sake of wasting time.¹⁷⁹ However, the negotiations permitted during this time make this system far superior to the requests for permission to build, as in Pennsylvania.¹⁸⁰ Such negotiations go to the heart of what the private ISPs want—the ability to provide service for profit—while allowing the municipality a chance to bring in the broadband Internet service at an affordable rate, perhaps via various forms of public subsidies. If successful, such negotiations will end in a compromise in which both sides get what they want, eliminating the need for protracted legal or public opinion battles. In the end, if the city still opts to build its own network, its actions will be out of necessity as the private sector will have opted not to enter the market on acceptable terms.

While this provision is quite reasonable as a middle ground, it in no way alleviates the need to reform other provisions in state laws, including North Carolina's. Other burdensome provisions weigh heavily against a municipality in its negotiations with private ISPs. In the context of this particular provision, the more difficult it is for a city to build a network, the less flexible private ISPs are likely to be in negotiations as they can be confident that even if negotiations fail the public network may still never materialize.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* § 160A-340.6(f).

¹⁷⁸ *Id.*

¹⁷⁹ *See supra* Part II.B.2.a–d.

¹⁸⁰ *See supra* Part II.B.2.a (describing Pennsylvania's requirement that incumbent ISPs have time to consider entering the market).

c. The Unserved Area Exemption

Recognizing the hardships faced by citizens in rural areas, some states have adopted the unserved area exemption, which protects municipalities deemed “unserved” by the private sector from the requirements of the statute. For example, North Carolina’s version defines an unserved area as “a census block . . . in which at least fifty percent (50%) of households either have no access to high-speed Internet service or have access to high-speed Internet service only from a satellite provider.”¹⁸¹ Municipalities seeking this exemption must petition the North Carolina Utilities Commission for a determination that the area is unserved, at which time private ISPs may also object to the petition on any grounds that argue against the city’s eligibility to be deemed unserved.¹⁸²

This form of exemption is absolutely critical to broadband deployment, especially in light of the FCC’s findings that deployment is proceeding more slowly than desired.¹⁸³ Unserved communities like those specified in North Carolina’s statute are exactly the sort of municipalities likely to crave a public network to fill the lack of broadband service. Those same communities are also likely to be viewed by the private sector as unprofitable and thus private ISPs are unlikely to enter the market. Consequently, municipal networks are the only real hope of broadband access for citizens in those areas, and imposing the restraints discussed in this Note would likely obliterate the prospects of a public network coming to fruition. The modified provisions discussed in Part II.B.2 are designed to protect ISPs’ interests in expanding into new markets. However, these procedural hurdles are not necessary in small rural communities because ISPs are unlikely to expend the resources necessary to serve these remote and sparsely populated areas.

III. JUSTIFICATIONS FOR THE STATE-LEVEL PRONG

The primary justification for the state-level prong is that it facilitates broadband penetration in both unserved and underserved areas. The FCC expressed this view in its analysis of the circumstances of *Missouri Municipal League*.¹⁸⁴ Simply put, municipalities are entities

¹⁸¹ N.C. GEN. STAT. § 160A-340.2(b).

¹⁸² *Id.*

¹⁸³ See *supra* Part I.A and I.C for discussions of the FCC’s position on broadband deployment rates.

¹⁸⁴ See *Nixon v. Mo. Mun. League*, 541 U.S. 125, 142 (2004) (Stevens, J. dissenting) (“[M]embers of the Federal Communications Commission . . . have taken the view that municipi-

that can provide broadband Internet service and, in some cases, may be the only entity willing to take on the expense of providing such service. Thus, restrictions on municipalities' ability to provide that service, whether procedural hurdles or cost-raising measures, inhibit the national availability of broadband service.

Broadband deployment is analogous to the deployment of electricity in the United States in the early twentieth century. In the 1880s, most electricity in the United States was supplied by large, private companies that did not view extending service to less densely populated areas as profitable or feasible and thus chose to ignore them in favor of urban markets.¹⁸⁵ In 1889, Detroit was the first municipality to create its own power company, which was successful in cutting costs to customers.¹⁸⁶ Over the next few decades, following Detroit's example, over 3,000 municipalities formed their own power companies.¹⁸⁷ One commentator identified three major impacts of these developments: (1) Congress passed the Rural Electrification Act of 1936, which provided federal assistance for electricity service deployment to rural areas; (2) public companies put added pressure on private companies to operate more efficiently, lowering costs and igniting innovation; and (3) unserved municipalities were able to remain economically viable by taking matters into their own hands and building their own power systems.¹⁸⁸

The similarities between the electricity and Internet markets in this context are striking. FCC Commissioner Copps pointed directly to rural electricity expansion in his praise for municipal broadband projects.¹⁸⁹ A scholar notes that private ISPs are acting the same way that private power companies did in lobbying strongly in opposition to public entities entering the market.¹⁹⁰ Thus, there is reason to believe that, with widespread municipal broadband, the result would be similar in that broadband service would become far more widely available and arguably at higher quality. Such a similarly positive result is not certain, as broadband technology continues to evolve relatively quickly as compared to plumbing or paving, but history indicates that

pal entry 'would further the goal of the [Telecommunications Act of 1996] to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential.').

¹⁸⁵ O'Loughlin, *supra* note 54, at 483.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Gotsch, *supra* note 87.

¹⁹⁰ O'Loughlin, *supra* note 54, at 490.

municipalities stand a good chance of satisfactorily filling the role of service provider. Moreover, this Note is more concerned with unserved communities, as most areas populated enough to have private ISP broadband service available have no need—and thus little, if any, desire—to construct a municipal network that would compete directly with the private sector.

Another justification for municipal broadband is that municipal networks combat the private sector's tendency toward monopolistic or oligopolistic behavior, keeping prices reasonable and quality of service high.¹⁹¹ Similarly, consolidation in the telecommunications industry is concentrating control over the Internet in the hands of a few private companies.¹⁹² Municipalities serve as competitive threats to the established private ISPs, forcing them to keep prices down and quality high. Laws that restrict municipal entry into the market degrade the efficacy of this deterrent effect and thus should be minimized.

IV. COUNTERARGUMENTS TO THE STATE-LEVEL PRONG

The most prominent argument against municipal networks is that they are likely to fail under their own expenses and debt burdens. However, this counterargument has been addressed throughout the proposed solution, as debt management is an integral part of the proposed solution via feasibility studies.¹⁹³

A novel counterargument to this Note's proposed solution is that some state laws may not actually apply to broadband networks at all, as broadband is technically classified as an "information service."¹⁹⁴ But this counterargument is speculative at best, as it is largely semantic and lacks any verifiable evidence that such an interpretation has ever been applied.¹⁹⁵ Moreover, the author advancing this argument, John Blevins, focused his research on the signaling and chilling effects of municipal broadband regulation, agreeing that the restrictions "have played a key role in stifling municipal services," and thus in

¹⁹¹ See *id.* at 483.

¹⁹² See Craig Dingwall, *Municipal Broadband: Challenges and Perspectives*, 59 *FED. COMM. L.J.* 67, 76–77 (2006).

¹⁹³ See *supra* Part II.B.3.a.

¹⁹⁴ Blevins, *supra* note 10, at 110–11 ("Indeed, several of the state laws never applied to broadband, or stopped applying after the FCC reclassified broadband access as an 'information service,' which . . . arguably limits the scope of some states' restrictions on municipal broadband," as some laws restrict "telecommunications services.").

¹⁹⁵ *Id.* at 111.

stifling broadband deployment.¹⁹⁶ Therefore, Blevins's argument does not obviate the need for this Note's proposed solution.

Another counterargument addresses the problem of broadband deployment by instead using federal funds to subsidize private construction of broadband networks in rural areas. For example, in October 2011, the FCC approved a plan to expand the purpose of the \$4.5 billion Universal Service Fund ("USF") from helping deploy only telephone service to rural areas to deploying broadband to rural areas.¹⁹⁷ In July 2012, the FCC announced \$115 million in public funding would be disbursed from the Connect America Fund (created via the USF's modernization) to deliver broadband service to about 400,000 customers in rural areas within three years.¹⁹⁸

However, this sort of solution is insufficient given the still-significant lack of broadband deployment, especially in rural areas.¹⁹⁹ The USF and similar public funds are not enough to fill the gaps quickly and municipalities, which are vastly more responsive to their own economic needs and limits than public funds, are in a far better position to assess their respective situations. While subsidies of this sort are helpful, they do not go far enough, as unserved communities remain at the mercy of a large entity for help in obtaining broadband service (albeit a federal one rather than a private ISP) rather than having the power to take matters into their own hands and fix the problem quickly.

Another argument made against municipal networks is that they are anticompetitive to the point of creating antitrust liability for their owners. While the state action doctrine shielding state-sanctioned enterprises from federal antitrust law likely does not apply to municipalities,²⁰⁰ this argument still fails because the proposed solution includes

¹⁹⁶ *Id.*

¹⁹⁷ Whitney Burdette, *FCC Approves Plan to Reform Universal Service Fund*, ST. J. (Dec. 12, 2011), <http://www.statejournal.com/story/15915426/fcc-approves-plan-to-reform-universal-service-fund>.

¹⁹⁸ News Release, FCC, FCC Kicks-Off 'Connect America Fund' with Major Announcement: Nearly 400,000 Unserved Americans in Rural Communities in 37 States Will Gain Access to High-Speed Internet Within Three Years (July 25, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0725/DOC-315413A1.pdf.

¹⁹⁹ See News Release, FCC, FCC Broadband Report Finds Significant Progress in Broadband Deployment, but Important Gaps Remain (Aug. 21, 2012), http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0821/DOC-315866A1.pdf (finding that 19 million Americans still lack access to fixed broadband service, 14.5 million of whom live in rural areas).

²⁰⁰ See *Parker v. Brown*, 317 U.S. 341, 350–51 (1943) ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."). The state action doctrine may not apply to municipal broadband, though, because *Parker v. Brown* requires the state to affirma-

safeguards to prevent the municipal network from using its public resources to anticompetitive ends.²⁰¹

Furthermore, as a matter of economic policy, the ISP with the greatest advantage in just about any market will be the incumbent (i.e., the first entrant to the market). Professor Hannibal Travis observed that “[t]he market for local access to broadband tends to be a ‘natural monopoly,’ at least in its stages of ‘growth,’” as “large economies of scale . . . favor monopolists over new entrants” regardless of whether the entity that first served the market is owned privately or publicly.²⁰² Considering the safeguards included in this Note’s proposed solution and the nature of the broadband market, any monopolistic advantage a municipal network enjoys would be the product of natural market forces. Any private ISP would enjoy the same advantages if it were to take advantage of this Note’s proposal to require a private sector appeal before constructing a municipal broadband network.²⁰³

A counterargument from the extreme end of the pro-municipal network spectrum is that this Note’s proposed solution does not go far enough and that municipalities should seize control of the “last mile”²⁰⁴ of broadband infrastructure, leaving private ISPs to handle the “backhaul.”²⁰⁵ The argument is efficiency-based, as it asserts that separating the backhaul from the last mile will encourage the separate entities to innovate and improve in their specific fields while cutting the excess costs associated with each ISP having to build its own lines in both the last mile and the backhaul.²⁰⁶

However, even the author of this argument admits that it might be an “unworkable” solution designed to educate regulators by aiding their understanding of “core issues with the current regulatory struc-

tively sanction the action, in this case the construction of municipal broadband networks. For further discussion of the state action doctrine in the municipal context, see generally Donald Gene Kalfen, *Municipal Antitrust: An Overview*, 60 CHI.-KENT L. REV. 349 (1984).

²⁰¹ See *supra* Part II.B.2.d–e (providing, among other things, that some advantages municipalities enjoy in constructing and operating broadband networks which private ISPs lack cannot be used by the municipality once private ISPs declare their intent to enter the market).

²⁰² See Travis, *supra* note 159, at 1715–16.

²⁰³ See *supra* Part II.B.3.b.

²⁰⁴ The “last mile” includes the wires run from the utility pole to the home. Myles Roberts, Note, *Opening the Last Mile to Competition*, 4 VA. SPORTS & ENT. L.J. 309, 310–11 (2005).

²⁰⁵ “Backhaul” includes the more centralized data processing and delivery equipment into which the “last mile” is connected. See Rural Broadband Report, 24 FCC Rcd. 12,791, 12,828 (Oct. 19, 2009).

²⁰⁶ See Roberts, *supra* note 204, at 331–33, 336–37.

ture” in hopes of facilitating a “major regulatory overhaul.”²⁰⁷ While the proposal is bold and well-articulated, it is impractical in its scope and ambition as well as dangerous in creating a monopolist in every market that would lack incentive to innovate over the last mile. In contrast, this Note’s proposed solution is far more practical in that its suggestions are more politically palatable and less jarring to the status quo.

Another potential response to this Note’s proposed solution is to encourage municipalities to subsidize advanced wireless Internet service (e.g., individual wireless Internet computer plug-in devices from Verizon Wireless) wholesale from private ISPs for the benefit of residents and businesses. While this would save the municipality a great deal of money and time, it is ultimately an insufficient response to the core problems this Note seeks to resolve. Aside from wireless broadband’s present inferiority to wired networks in both speed and reliability,²⁰⁸ this solution still relies on private ISPs to provide service to isolated and unserved rural areas, a prospect of questionable profitability for the private ISPs. The subsidization plan also commits the municipality to dedicating its resources to a budget expense indefinitely, without the prospect of recovering the costs in the long run through the operation of a profitable ISP business or via sale of the municipal network to a private entity in the future.

CONCLUSION

State legislatures are in the unenviable position of having to balance the sometimes competing interests of their various constituencies, and that is the case in the municipal broadband context. Many states have put too much emphasis on the private ISPs’ concerns by effectively prohibiting municipal broadband networks. While the private ISPs’ concerns about direct competition with public entities for customers are legitimate, states should not take the drastic step of prohibiting public entities from entering the broadband market entirely. Instead, states should carefully construct laws that are designed to facilitate municipal broadband in underserved communities because of the great benefits these communities derive from broadband. These laws, though, should also reasonably protect the private sector’s interests in expanding its networks to these same areas.

²⁰⁷ *Id.* at 310.

²⁰⁸ *See supra* Part I.B.

In light of the tremendous industry pressure the private sector exerts on state legislatures, the federal government must force states to relax their laws impeding municipal broadband. The most effective way for the federal government to do so is by amending section 253(a) of the Telecommunications Act of 1996 to expressly apply to public entities. Amending the law would grant the FCC authority to examine the impact of state laws on a case-by-case basis, declaring those statutes which effectively prohibit municipal broadband to be preempted.

Above all, policymakers at both the state and federal levels need to look past the economics of this debate and see the real impact the lack of broadband access has on people's everyday lives. The prospect of a home lacking electricity or telephone service today is unthinkable to most Americans, but this was not always the case. Federal, state, and local governments all played integral and often direct roles in ensuring that Americans in all areas of this expansive nation would have access to these critical services at affordable prices. As the Internet's role in daily American life continues to grow, the need for reliable and affordable high-speed Internet access will only become more pressing. Federal and state legislators should follow in their electricity-focused predecessors' footsteps by embracing municipal broadband as a means to illuminate the information technology darkness in which those without affordable broadband are forced to live.