

Nos. 15-3291 & 15-3555

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

THE STATE OF TENNESSEE,
THE STATE OF NORTH CAROLINA,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, and
THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

**BRIEF OF *AMICUS CURIAE* BENTON FOUNDATION, COMMON
CAUSE, NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, PUBLIC
KNOWLEDGE, AND SHLB COALITION IN SUPPORT OF
RESPONDENTS**

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November 12, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae*

submit this Corporate Disclosure Statement:

All *Amicus Curiae* are nonprofit corporations and therefore have no owners.

Respectfully Submitted,

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE¹

The Benton Foundation is a private foundation that works to ensure that media and telecommunications serve the public interest, enhance our democracy, and help underserved communities.² Benton Foundation filed comments below favoring the Federal Communications Commission’s decision to preempt state laws that burden or prevent expansion of municipal broadband because municipal networks often serve underrepresented communities better than traditional Internet providers.

Common Cause, founded in 1970, is a nonpartisan grassroots organization with more than 400,000 members in all 50 states. Common Cause advocates for upholding the core values of American democracy, including public interest telecommunications policies. Common Cause filed comments below supporting the FCC’s decision.

New America Foundation is dedicated to the renewal of American politics and prosperity in the Digital Age. The Open Technology Institute (“OTI”) is a

¹ All parties have consented to the filing of this brief. Pursuant to FRAP 29(c)(5), *Amicus Curiae* states that no counsel for any party, other than *Amicus Curiae* and its counsel, has authored this brief in whole or in part, and no other party or person has made a monetary contribution for the preparation or submission of this brief.

² These comments reflect the institutional view of the Benton Foundation and, unless obvious from the text, are not intended to reflect the views of individual Foundation officers, directors, or advisors.

program within the Foundation that promotes the deployment of broadband. OTI strongly supports the development of community networks and filed comments below supporting the FCC's decision.

Public Knowledge is a nonprofit organization that promotes freedom of expression, an open internet, and access to affordable communications tools. Public Knowledge works to shape policy on behalf of the public interest and filed comments below supporting the FCC's decision.

The Schools, Health & Libraries Broadband Coalition's ("SHLB Coalition") promotes open, affordable, high-capacity broadband access to the Internet for anchor institutions. Anchor institutions can better serve their communities if they have a choice of broadband providers — both commercial and non-profit. SHLB Coalition filed comments below supporting the FCC's decision.

SUMMARY OF ARGUMENT

The Federal Communications Commission preempted Tennessee and North Carolina laws that precluded municipal broadband networks from expanding and that placed significant burdens on municipalities attempting to provide their own broadband networks. However, there are hundreds of cities that have built or are currently building broadband networks to address the needs of their communities. To illustrate, this brief will discuss three tremendously successful municipal networks: Longmont, CO; Lafayette, LA; and Tullahoma, TN. These networks are

providing significant benefits to their communities and anchor institutions including ultra-high-speed Internet connections that those communities would not otherwise have access to.

This brief also responds to arguments made by Petitioners' *amici* that some networks, including those in Burlington, VT, Provo, UT, and UTOPIA, have supposedly "failed." Those *amici* entirely ignore the significant benefits those networks continue to provide their communities. Once these benefits are accounted for, these supposed "failed" networks, in fact, have been successful because they continue to provide high-speed Internet access to their communities at a low cost.

ARGUMENT

The Federal Communications Commission ("FCC") preempted laws in Tennessee and North Carolina that imposed barriers to network investment under its Section 706 authority. *City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340, et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, 30 FCCRcd 2408 (2015) (PA 1-116) ("*Order*"). Section 706 states that the FCC "shall encourage the deployment...of advanced telecommunications capability to all Americans...by utilizing, in a manner consistent with the public interest, convenience, and necessity,...measures

that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 USC §1302. The FCC properly found that state laws burdening municipal broadband networks were “barriers to infrastructure investment.” Thus, the FCC preempted those laws. While the *Order* was limited to preempting Tennessee and North Carolina laws, many other states have passed similarly burdensome laws, even when municipalities in those states have successfully built and sustained broadband networks.³

Municipalities build networks and provide broadband services for a variety of reasons. Most importantly, municipalities are in the best position to identify the needs of their communities and anchor institutions, and respond to those needs, particularly in rural areas.⁴ Many municipalities have decided that private broadband providers were providing insufficient speeds and service, which left their communities behind digitally. Truly high-speed and ubiquitous broadband connections are necessary for active civic and social engagement and even basic services such as signing up for utilities and applying for a job require Internet

³ *State Restrictions on Community Broadband Services or Other Public Communications Initiatives*, Baller Herbst Law Group (June 1, 2015), <http://www.baller.com/wp-content/uploads/BallerHerbstStateBarriers6-1-15.pdf>.

⁴ Eric Null, *Municipal Broadband: History's Guide*, 9 ISJLP 21, 22 (2013).

access.⁵ Thus, several municipalities have built networks for their communities.⁶

When municipalities build their own networks, neighboring communities may also want access to those networks, but state law precludes that expansion in many instances. State laws also force municipalities building their own networks to incur significant costs and delays before the first wire is ever connected.

This brief discusses three municipal networks that have been tremendously successful, even when their state legislatures imposed barriers costing those municipalities valuable time and money: Longmont, CO; Lafayette, LA; and Tullahoma, TN. Further, this brief argues that several projects cited by *amici* for Petitioners are not “failures” and that their analyses place undue emphasis on the costs and debt of the networks without regard for the benefits those networks continue to provide.

I. COUNTLESS MUNICIPALITIES HAVE BUILT AND MAINTAINED BROADBAND NETWORKS THAT

⁵ Prepared Remarks of Commissioner Mignon L. Clyburn at 3, Progressive Policy Institute, June 17, 2015, https://apps.fcc.gov/edocs_public/attachmatch/DOC-333978A1.pdf.

⁶ Municipalities often build state-of-the-art 100% fiber-optic networks providing speeds much faster than other providers. *See* Community Network Map, Muninetworks, <http://muninetworks.org/communitymap> (“[there are at least] 83 communities with a publicly owned [fiber-to-the-home] network reaching most or all of the community”); Fiber-Optic Internet in the United States, broadbandnow, <http://broadbandnow.com/Fiber> (100% fiber-optic networks are “commonly referred to is the gold standard of residential internet connections.”).

**PROVIDE SIGNIFICANT BENEFITS TO THE PUBLIC
AND LOCAL ECONOMIES.**

The municipal networks in Longmont, CO, Lafayette, LA, and Tullahoma, TN, have been immensely successful and have provided significant benefits to their communities including low-cost high-speed Internet access.

A. Longmont, Colorado has built a successful municipal broadband network despite barriers imposed by state law.

Longmont, CO, has a long history of providing municipally-owned utilities services. Longmont Power and Communications has been providing electric power and responding to community needs since 1912. In 1997, it built its own fiber network mostly for governmental use. The city had to undergo several state-imposed procedural requirements before it could provide retail service over the network. Now that it has, Longmont has built one of the premier fiber-optic networks in the country, called “NextLight.”⁷ Unfortunately, state laws created great difficulty for the town in building and expanding the network.

⁷ NextLight was recently determined to be the fastest Internet service in the U.S., and won an award in 2013. Karen Antonacci, *Longmont’s NextLight Fastest Internet Service in U.S.*, Times-Call (May 11, 2015), http://www.timescall.com/news/ci_28095794/longmonts-nextlight-fastest-internet-service-in-us; *Longmont Wins Broadband Award*, Times-Call (Sept. 6, 2013), http://www.timescall.com/longmont-local-news/ci_24036247/longmont-wins-broadband-award.

1. Colorado has enacted requirements inhibiting municipal broadband.

In 2005, Colorado enacted a law limiting municipal provision of communications services.⁸ The law established the default that municipalities cannot provide any cable, telecommunications, or advance services. Colo. Rev. Stat. §29-27-103. A municipality may, however, provide such services if it follows several requirements imposed by law. First, the municipality must conduct a referendum seeking permission from the community. Colo. Rev. Stat. §29-27-201. A majority of those voting on the ballot must approve before the municipality can move forward. *Id.* No referendum is required if “[n]o private provider...provides the service anywhere within the boundaries of the local government,” and “the local government has submitted a written request to provide the service to any incumbent provider...within the boundaries of the local government,” and “[t]he incumbent provider has not agreed within sixty days of the receipt of [the] request...to provide the service or, if the provider has agreed, it has not commenced providing the service within fourteen months of the receipt of the request.” Colo. Rev. Stat. §29-27-202.

⁸ Scott Rochat, *TCS Picked to Build Longmont Fiber Rollout*, Times-Call (July 14, 2014), http://www.timescall.com/longmont-local-news/ci_26147819/tcs-picked-build-longmont-fiber-rollout.

Once a government overcomes these barriers, state law places further burdens on municipalities: “A local government shall not make or grant any undue or unreasonable preference or advantage to itself or to any private provider,” and shall not favor itself or any private provider in its local ordinances, including obligation to serve, access to rights of way, permitting, and quality of service. Colo. Rev. Stat. §29-27-301.⁹

2. Longmont eventually succeeded in overcoming Colorado’s burdensome laws.

Longmont, a city of almost 90,000 people, identified a local need in 2009: its citizens did not have access to next-generation, ultra-high-speed broadband networks that would allow the citizens of Longmont to be leaders in online services and that would attract more businesses seeking fast Internet speeds. Longmont’s decision to build the network rested in part on the private sector’s refusal to respond to the city’s needs. “It was the private sector that failed.... [The city] reached out to the private sector,” which refused to build.¹⁰

⁹ When Google Fiber was looking to expand its service in the United States, it “looked seriously at joining with Boulder’s network but bypassed the city because of” the state’s onerous laws. Jeremy Meyer, *Meyer: Colorado Law Hinders Cities’ Efforts to Expand Broadband Networks*, Denver Post (Aug. 8, 2014), http://www.denverpost.com/opinion/ci_26300274/meyer-colorado-law-hinders-cities-efforts-expand-broadband.

¹⁰ Trevor Hughes, *Town Creates High-Speed Revolution, One Home at a Time*, USA Today (Nov. 20, 2014),

Longmont first attempted a referendum in 2009. Telecommunications companies spent \$200,000 successfully opposing the measure. Two years later, Longmont attempted another referendum. This time, telecommunications companies spent double the previous round, about \$400,000, to oppose the measure. Despite the industry's increased spending, citizens approved the referendum.¹¹

The municipality's victory allowed it to move forward. In 2013, voters again approved a referendum to allow the city to issue \$45.3 million in bonds to build the network.¹² The city will pay the debt back exclusively through revenues generated by the network, not through increased taxes.¹³

NextLight is a 100% fiber-optic network, and has an appealing pricing and speed tier structure. For residents, new members receive a 1Gbps¹⁴ download and

<http://www.usatoday.com/story/news/nation/2014/11/19/longmont-internet-service/19294335>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ This brief extensively discusses broadband speed. For purposes of comparison, the average broadband download speed is approximately 20 megabits per second (Mbps). Copper telephone wires using DSL technology generally deliver no more than 10 Mbps. The highest speed available on a typical system is about 50 Mbps. By contrast, a Gigabit (1 Gbps) service (*i.e.*, 1000 Mbps) has many important advantages for residential and commercial use. On an average 20 Mbps connection, a two-hour movie can be downloaded in approximately 10.5 minutes.

upload connection (referred to as a “symmetrical” connection) for \$49.95 per month so long as they sign up within three months of the service becoming available in their area. Otherwise, the cost is \$99.95 per month. Other tiers are available as well: 25Mbps for \$39.95 per month, and digital voice is available for \$25 per month.¹⁵ For such a low price, consumers receive a value incomparable to other services.

Prices for commercial subscribers are also very low. NextLight offers symmetrical and non-symmetrical connections, in case the business does not require fast upload speeds. Businesses can receive a 1Gbps download/500Mbps upload connection for \$799.95 per month.¹⁶

3. Longmont builds out NextLight with great success and public benefit.

Longmont is currently building its network, and high consumer demand has pushed deadlines up. The original plan estimated completion by 2017,¹⁷ but some

On a Gigabit connection, however, it downloads in 8 seconds. *See How Fast Is Fiber Optic Internet?*, FastMetrics, <https://www.fastmetrics.com/how-fast-is-fiber-optic-internet.php>.

¹⁵ Rates and Services, NextLight, <http://longmontcolorado.gov/departments/departments-e-m/longmont-power-communications/broadband-service/rates-and-services>.

¹⁶ *Id.*

¹⁷ Scott Rochat, *Bids to Build Fiber Rollout Open June 16*, Times-Call (June 8, 2014), http://www.timescall.com/longmont-local-news/ci_25919667/bids-build-fiber-rollout-open-june-16.

phases have been moved up by as much as nine months.¹⁸ NextLight initially planned to achieve a take-rate (the percentage of homes passed that sign-up for the service) of 34% over the first five years. Instead, “in just the first three months, the first phase of the project achieved a take-rate of 45%.”¹⁹ Further, the following letter to the editor indicates the attitude of many Longmont citizens:

It’s really sad that the Longmont fiber optic Internet will take so long to be installed. From what I see, the two major competitors (Comcast and Century Link) seem to believe that customers are a bother.

One of those has pricing on their web page that they refuse to honor, while the other will not even try to be competitive.

A price competitive, local ISP, would be a benefit to all Longmont residents.

That, too may come to pass.

P.R. Lambert
Longmont²⁰

¹⁸ Karen Antonacci, *Longmont to Work Double-Time on NextLight Broadband Build-out*, Times-Call (Mar. 24, 2015), http://www.timescall.com/longmont-local-news/ci_27779026/lpc-work-double-time-nextlight-buildout.

¹⁹ Jonathan Rice, *NextLight Crushes Sales Projections*, Longmont Compass, <http://longmontcompass.com/nextlight-crushes-sales-projections>.

²⁰ P.R. Lambert: *Sad that Fiber Optic Is Taking So Long*, Times-Call (Aug. 30, 2014), http://www.timescall.com/opinion/letterstotheeditor/ci_26434698/p-r-lambert-sad-that-fiber-optic-is.

Businesses have also lined up for the service. From the outset, NextLight focused on businesses: “We’re really focused on economic development, so the ones that will put the most dollars (they save on broadband costs) back into their business, those are the ones we’re working with first.”²¹ This is particularly important because “[m]ore businesses believe (high-speed broadband) is critical for their ability to compete, particularly on a global stage.”²² NextLight has been very successful in that regard. City officials have said “about three dozen [businesses] are in line for the service.”²³ Circle Graphics, a producer of large format digital graphics, used to subscribe to CenturyLink, but switched to NextLight “because it needed better connectivity.”²⁴ Pumphouse, a brewpub and restaurant, signed up for NextLight because it needed better service for its business

²¹ Tony Kindelshire, *Longmont’s Fiber-Optic Loop Is Already Attracting Customers, Even Before a Formal Business Plan Has Been Announced*, Times-Call (May 4, 2013), http://www.timescall.com/news/longmont-local-news/ci_23174316/longmonts-fiber-optic-loop-is-already-attracting-customers.

²² Meyer, *supra* note 9.

²³ Tony Kindelshire, *About 20 Businesses Turn Out to Hear Longmont Power’s Pitch for Fiber Access*, Times-Call (May, 9, 2013), http://www.timescall.com/news/longmont-local-news/ci_23211272/about-20-businesses-turn-out-hear-longmont-powers.

²⁴ Lisa Gonzalez, *Longmont’s NextLight Offers Businesses, Residents Third Fastest Internet in the U.S.*, Muninetworks (May 13, 2015), <http://www.muninetworks.org/content/longmonts-nextlight-offers-businesses-residents-third-fastest-internet-us>.

functions.²⁵ Computer Terrain Mapping, a data hungry business, moved to Longmont “based on the promise of a gigabit connection.”²⁶ TinkerMill, a “makerspace,” is planning a “hackathon” to solicit ideas for how to use the data NextLight collects from its new network.²⁷ The network is a selling point for “Launch Longmont,” a coworking space that will have access to “ultra hi-speed Internet.”²⁸ It was also featured at Longmont Startup Week.²⁹

The network has brought significant benefits to schools. High schools in the area have started giving students mini iPads for individualized learning plans. Prior to NextLight, congestion in the network was common. With NextLight’s higher quality service, the students no longer experience significant network issues

²⁵ Kindelspire, *supra* note 21.

²⁶ Steve Elliott, *Understanding Longmont’s NextLight Fiber-Optic System*, Inside Longmont, Feb. 2015 at p. 10, http://issuu.com/insidelongmont/docs/ilmagazine_february2015.

²⁷ *Id.* at 12.

²⁸ *Launch Longmont – A New Co-Working Space*, Longmont Compass, <http://longmontcompass.com/launch-longmont-coworking-space>

²⁹ Description of “Community Broadband – NextLight” panel, Longmont Startup Week (June 4, 2015), <https://longmontstartupweek2015.sched.org/event/1c0111e542f3fa3274db30bee2ea0f44#.VWxtu9JVhBc>.

and can focus on learning, while the school saves money and has higher quality Internet access.³⁰

NextLight has also created social benefits. The most obvious example of this was in 2013 when the region experienced a natural disaster, which tested the resilience of the network. When the disaster hit, the “network enabled an enormous impromptu crisis communication and crisis survival operation.”³¹ The city used its network and increased capacity to inform its citizens and upload videos on YouTube of the disaster. “A team of round-the-clock webmasters and volunteers kept the city’s servers and Web pages pumping out videos, Facebook posts, Twitter messages and other communications to residents, the Army Corps of Engineers and people outside the area.”³² City officials said “[w]ithout the network, there is no way we could have done this, particularly on such a massive scale.”³³

³⁰ Lisa Gonzalez, *Longmont Schools Save, Increase Bandwidth with Help of LPC*, Muninetworks (Oct. 17, 2014), <http://www.muninetworks.org/content/longmont-schools-save-increase-bandwidth-help-lpc> (see video).

³¹ Craig Settles, *Planning for the Best Case*, Broadband Communities Magazine, May/June 2014, at 44, http://www.bbcmag.com/2014mags/May_Jun/BBC_May14_webFINAL.pdf.

³² *Id.*

³³ *Id.*

NextLight has also had a noticeable effect on competition. As noted above, private providers refused to build the network that Longmont wanted. Once the city built it for itself, competitors responded quickly and ultimately for the benefit of consumers. Comcast initially responded by attempting to limit the number of households that could sign up for NextLight through exclusivity agreements in homeowners associations—in one case, Comcast offered \$30,000 to the association to induce them to agree.³⁴ When this strategy failed, Comcast had no choice but to attempt to compete. Recently, Comcast unveiled a planned 2Gbps service in Longmont. The service is much more expensive than NextLight’s service.³⁵

Longmont’s municipal broadband service has been immensely successful. With extremely fast speeds at very low prices and a locally accountable network, NextLight will continue to provide customers economic and social benefits while making Longmont one of the premier tech cities.

³⁴ Jonathan Rice, *Paying for Comcast, Whether You Like it or Not*, *Longmont Compass*, <http://longmontcompass.com/comcast-deals-could-have-killed-longmont-nextlight>.

³⁵ See *Multi-Gig Offers*, Comcast, <http://www.xfinity.com/multi-gig-offers> (2Gbps service costs \$299.95 per month).

B. Lafayette, Louisiana has built a successful municipal broadband network despite burdensome state law obstacles.

Lafayette, LA, similarly has a history of municipally-provided services. In 1896, the town voted unanimously to allow the municipality to construct its own electric utility system.³⁶ Now, almost 120 years later, Lafayette is providing its own high-speed, 100% fiber-optic network to its citizens under the name “LUS Fiber.”³⁷ The city, however, encountered numerous obstacles to building the network, including onerous state laws and numerous lawsuits from other communications providers.

1. Louisiana has passed laws inhibiting broadband deployment and investment.

In 2004, after Lafayette’s announcement that it would build a municipal broadband network, Louisiana passed the “Local Government Fair Competition Act” aimed at limiting municipal provision of communications services.³⁸ The bill

³⁶ Testimony of Terry Huval, Director of Utilities, Lafayette, Louisiana, Hearing on “Connecting Main Street to the World: Federal Efforts to Expand Small Business Internet Access,” Committee on Small Business and Entrepreneurship, Apr. 27, 2010, http://www.sbc.senate.gov/public/?a=Files.Serve&File_id=646b01b6-6e75-4f5a-9c0f-790c0ba48889 at 1.

³⁷ About LUS Fiber: Timeline, LUS Fiber, <http://lusfiber.com/index.php/about-lus-fiber/historical-timeline>.

³⁸ Testimony of Terry Huval, *supra* note 36, at 3.

was backed by the major Internet service providers in Lafayette: BellSouth (now AT&T) and Cox Communications.³⁹ The law sets a presumption that municipalities “may not...provide to one or more subscribers” a cable, telecommunications, or Internet service unless it meets the requirements in the law. La. Rev. Stat. §45:844.47. The law imposes several onerous requirements.

Municipalities must

1. Hold a preliminary hearing and conduct a feasibility study to determine when annual revenues will exceed annual costs “by at least the amount necessary to meet the [city’s] bond obligations,” La. Rev. Stat. §45:844.48; then
2. Hold two more public hearings within 60 days of receiving the feasibility study and at least seven days apart to present the feasibility study to the public, La. Rev. Stat. §45:844.49; then
3. Hold a referendum asking if the municipality should “be authorized to provide” the service, which must be approved by a majority of those voting on the ballot, La. Rev. Stat. §45:844.50; and
4. Establish a communications services enterprise fund to account for the locality’s operation of the network, adopt operating and capital budgets, avoid subsidizing the network with other funds or cross-subsidize other parts of government, avoid favoring itself in commercial dealing, and impute several costs not otherwise incurred, La. Rev. Stat. §§45:844.51, 45:844.53.

Thus, any municipality attempting to provide communications services to its citizens must comply with an arduous legal and regulatory regime that places

³⁹ *Id.*

municipalities at a “significant disadvantage.”⁴⁰ Lafayette is the only Louisiana municipality to build a broadband network.⁴¹

2. Lafayette builds LUS Fiber, a revolutionary network, over significant barriers.

The city of Lafayette, a town of 120,000 residents,⁴² initially built a ring of fiber-optic cable around the city in 1998 for governmental use only, though the cable had more capacity than the city required. As businesses grew interested in using that excess capacity, the city decided to offer wholesale services in 2002.⁴³ Two years later, city leadership decided to build a retail network that would provide high-speed connectivity for all Lafayette residents. That is when the “[b]attle” began with the other communications service providers.⁴⁴

At first, BellSouth and Cox Communications lobbied the state legislature seeking passage of a bill imposing extremely onerous obligations on municipal broadband. The governor forced the interested parties to compromise on the bill, and the “Local Government Fair Competition Act” passed in July 2004.⁴⁵ While

⁴⁰ *Id.*

⁴¹ Community Network Map, Muninetworks, <http://muninetworks.org/communitymap>.

⁴² Christopher Mitchell, *Broadband at the Speed of Light* at 16, Institute for Local Self-Reliance, <http://ilsr.org/wp-content/uploads/2012/04/muni-bb-speed-light.pdf>.

⁴³ *Id.* at 17.

⁴⁴ *Id.* at 19.

⁴⁵ *Id.*

the law did not prevent Lafayette from providing retail service, it created significant new barriers causing Lafayette to take much longer than predicted to achieve its goals.

Lafayette proceeded with its buildout plan by conducting a feasibility study and issuing a bond ordinance. At that point, BellSouth filed and won a lawsuit “challeng[ing] Lafayette’s *bond ordinance*, claiming that the bonding statute required a referendum before issuing bonds,” even though the law did not require it.⁴⁶ The city decided to comply with the decision because it was more expedient than appealing it.⁴⁷

After that attempt to obstruct the network, grassroots campaigns became immensely popular and the obstruction attempts backfired. Soon, the network had significant public support, which showed when it came time to vote in mid-2005 on whether Lafayette residents would give the city authority to issue bonds for the network. “The result was a landslide 62 percent yes, with 27 percent of eligible voters casting ballots for a single-issue election....”⁴⁸ Lafayette then had the

⁴⁶ “BellSouth developed a legal strategy to force a referendum by challenging the City’s authority in other areas.” *Id.* at 20.

⁴⁷ *Id.*

⁴⁸ *Id.* at 22.

authority and permission to issue up to \$125m in bonds, which it issued in September 2005.⁴⁹

Other communications providers continued filing lawsuits. They again challenged the bond ordinance claiming that it was a form of cross-subsidization “because the general revenues of the utility indemnified them.”⁵⁰ The district court held for LUS, but the appeals court overruled that decision. Again, instead of appealing the decision, LUS decided it was better to comply with the court’s order on how to structure the bond. When Lafayette revised the bond ordinance, it saw *another* lawsuit, this time filed by private citizens.⁵¹ This case went up to the Louisiana Supreme Court, which ruled unanimously in favor of LUS in 2007.

Construction of LUS Fiber finally began in 2008, after nearly four years of delay imposed by incumbents repeatedly frustrating progress. The city spent nearly \$4m on legal fees during this time.⁵² The other communications companies continue to “intimidat[e]” the city by filing public records requests and by raising rates in the multi-parish area and then going door-to-door to offer steep discounts

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The identity of these two citizens, and their ability to pay high legal fees, is still a mystery. *Id.*

⁵² Testimony of Terry Huval, *supra* note 36, at 7.

to LUS subscribers in an effort to lure them back.⁵³ However, in the end, LUS estimated that “the citizens of the community have saved 5.7 million dollars—in part direct saving [sic] from LUS’s cheaper...services and in part as a consequence of Cox lowering its prices and giving out special rates.”⁵⁴

LUS Fiber began serving its first customers in February 2009 and the network buildout was fully complete in early 2011.⁵⁵ Lafayette, like Longmont, faced increased demand for its services, and accelerated its buildout.⁵⁶ LUS Fiber offers inexpensive triple-play packages and also many tiers of service.⁵⁷

3. LUS Fiber created significant public and competitive benefits.

As with Longmont, Lafayette saw significant public and competitive benefits. Cox was particularly aggressive. First, it froze rates for its Lafayette

⁵³ *Id.* at 8-9.

⁵⁴ Christopher Mitchell, *Is Lafayette Community Broadband Doing OK or Great?*, Muninetworks (Aug. 22, 2011), <http://www.muninetworks.org/content/lafayette-community-broadband-doing-ok-or-great>.

⁵⁵ *Broadband at the Speed of Light*, *supra* note 42, at 22.

⁵⁶ Christopher Mitchell, *Lafayette Plans Faster Growth; US BB Embarrasses; Seattle Needs Volunteers*, Muninetworks (Sept. 3, 2009), <http://www.muninetworks.org/content/lafayette-plans-faster-growth-us-bb-embarrasses-seattle-needs-volunteers>.

⁵⁷ Internet: Package & Pricing Guide, LUS Fiber, <http://lusfiber.com/index.php/internet/pricing-guide>; Video: Package & Pricing Guide, LUS Fiber, <http://lusfiber.com/index.php/video-main/pricing-guide>.

customers between 2004 and 2007 during the pendency of the years-long legal battle.⁵⁸ As mentioned above, Cox subsequently raised rates in the area and then went door-to-door offering steep discounts to win back its customers.⁵⁹ Cox has continued its opposition at the Public Service Commission level by intervening “after [the PSC] gave the utility a clean bill of health” for fiscal years 2008-10.⁶⁰ When Cox rolled out its fastest tier, a 50Mbps service, it chose Lafayette as the first market to receive it “due to its competitiveness.”⁶¹

LUS Fiber has created significant benefits for the community. One of the most obvious benefits is the number of new businesses relocating, staying, or expanding within Lafayette and the jobs those businesses bring. CGI, an IT firm, opened an on-shore delivery center in Lafayette, bringing with it 400 direct jobs and 405 indirect jobs with an average salary of \$55,000 per year. Enquero, an enterprise solutions company in Silicon Valley, put an agile delivery center in Lafayette, bringing 315 direct jobs and about 350 indirect jobs, with an average salary of \$64,000 per year. Perficient, an IT and management consulting firm, built a domestic delivery center in Lafayette bringing 245 direct jobs and 248

⁵⁸ Testimony of Terry Huval, *supra* note 36, at 7.

⁵⁹ *Id.* at 8-9.

⁶⁰ *Broadband at the Speed of Light*, *supra* note 42, at 23.

⁶¹ *Id.* at 29.

indirect jobs, with salaries averaging approximately \$60,000 per year.⁶² Pixel Magic, a movie production company that worked on “Secretariat,” moved to Lafayette for the fast Internet connection, bringing with it more jobs.⁶³ NuComm International announced it would move to Lafayette because of the network, intending to bring with it 1,000 jobs.⁶⁴ Other companies have moved to Lafayette for the fiber, including Tapes Again (a media production company)⁶⁵ and Skyscraper Holding (a tech startup).⁶⁶ The network allowed a local medical practice, Gastroenterology Clinic of Acadiana, to finally upgrade to an all-electronic office.⁶⁷

⁶² Transcript: Community Broadband Bits Episode 144, Muninetworks (Apr. 10, 2015), <http://muninetworks.org/content/transcript-community-broadband-bits-episode-144>.

⁶³ Michael Pollick, *Dark Lines Are a Draw for Business*, Herald-Tribune (Sept. 7, 2010), <http://www.heraldtribune.com/article/20100907/ARTICLE/100909825/-1/news?p=all&tc=pgall&tc=ar>.

⁶⁴ *Broadband at the Speed of Light*, *supra* note 42, at 30.

⁶⁵ Lisa Gonzalez, *Publicly Owned LUS Fiber Network Attracts Another Business to Lafayette*, Muninetworks (Feb. 28, 2013), <http://www.muninetworks.org/content/publicly-owned-lus-fiber-network-attracts-another-business-lafayette>.

⁶⁶ Rick Jervis, *Louisiana City Blazes High-Speed Web Trail*, USA Today (Feb. 5, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-02-01/broadband-telecom-lafayette/52920278/1>.

⁶⁷ *Id.*

LUS Fiber has also been providing low-cost, high-value broadband connections to residents of Lafayette. LUS Fiber offers five tiers of broadband service ranging from 3mbps at \$19.95/month to 2Gbps at \$299.95.⁶⁸

Local schools and libraries also have subscribed to the network. St. Thomas More, a private high school in Lafayette, originally subscribed to the 100Mbps tier for its students, but then upgraded to the 1Gbps service when it realized it needed more capacity after it gave all students Internet-connected devices. The school paid \$999.95 per month rather than the \$20,000 per month cost from other providers.⁶⁹ The public libraries in the area also subscribe to LUS Fiber.⁷⁰

Lafayette's municipal broadband service has been very successful at making the city a tech hub and giving its residents access to blazing fast Internet speeds at low cost.

C. Tullahoma, Tennessee builds a broadband network despite state law-imposed barriers.

Another city with a history of municipally-provided services is Tullahoma, TN. Tullahoma formed Electric Light and Water Works Commission in 1901 to

⁶⁸ Internet: Package & Pricing Guide, LUS Fiber, <http://lusfiber.com/index.php/internet/pricing-guide>.

⁶⁹ *Broadband at the Speed of Light*, *supra* note 42, at 29.

⁷⁰ *Id.*

build a generating plant for the city.⁷¹ Throughout its history, Tullahoma expanded its offerings. In 1902, it built a public water well, and in 1911 it built fire hydrants and water lines. By 1912, the Board of Electric Light, Water Works and Sewer Commissioners established rates for electricity. The city established the Board of Public Utilities in 1947.⁷²

The Tullahoma Utilities Board (“TUB”) was created in 1977, which has provided the city with electric, water, and sewer services. By 2008, TUB had built a network for “ultra high-speed internet, quality television, and crystal clear telephone services.”⁷³ The network has been very successful. However, despite repeated calls by communities adjacent to and even several miles away from Tullahoma, state laws make it difficult if not impossible to expand and meet that need.

1. Tennessee’s laws constricting municipal broadband.

While Tennessee’s laws are at issue in this appeal, a brief explanation is helpful. Tennessee gives municipal “electric plants” the authority to provide telephone and telecommunications services beyond their territorial borders with

⁷¹ TUB History, Tullahoma Utilities Board, <http://www.tub.net/about-us/tub-history>.

⁷² *Id.*

⁷³ *Id.*

permission from other municipalities, Tenn. Code Ann. §7-52-401, but limits the municipality's cable, Internet, or other "like" service footprint to its electric plant's "service area." Tenn. Code Ann. §7-52-601(a)-(b); Electric Power Board of Chattanooga Br. 4-5.

Municipalities must comply with several procedural burdens before it can begin building a broadband network. In Tennessee, a municipal electric system first must write a detailed business plan, including a three-year cost/benefit analysis, the total projected direct and indirect costs and revenues of the services, and a "description of the quality and level of services to be provided." Tenn. Code Ann. §7-52-602(1). Then, the Comptroller of the Treasury must provide a written analysis of the feasibility of the business plan within sixty days. Tenn. Code Ann. §7-52-602(2). The governing board then holds a public hearing. After waiting fourteen days after the hearing, two-thirds of the chief legislative body of the municipality must then approve the provision of services. Tenn. Code Ann. §7-52-602(4). Then, the municipality may proceed to a public referendum, the language of which is dictated by law. Tenn. Code Ann. §7-52-602(5). Once established, the municipality must create a separate broadband network division and cannot subsidize that division with other revenues. Tenn. Code Ann. §7-52-603(a)(1)(A).

2. Tullahoma builds LightTUBE, its fiber-optic network.

The city of Tullahoma, home to nearly 19,000 people, had been looking into providing its own communications service since the late 1990s. The city ultimately did not move forward with its plan, which would have created a hybrid fiber-coaxial network much like cable Internet systems today. In 2006, the TUB Board revisited this idea; it studied the network's feasibility and ultimately issued \$16.9m in bonds to finance the network, which it built between fall 2007 and fall 2008. LightTUBE served its first customer in January 2009.⁷⁴ The network serves all of Tullahoma and a few people outside of Tullahoma who have signed up for TUB's electric service, as per the Tennessee law.

Despite these burdens, many imposed by state law, LightTUBE is now a successful network. It had positive customer growth between 2009 and at least August 2014. LightTUBE has approximately 35% market share, approximately equal to its primary competitor Charter Communications. The city has paid almost

⁷⁴ Transcript: Community Broadband Bits Episode 54, Muninetworks (Mar. 5, 2015), <http://muninetworks.org/content/transcript-community-broadband-bits-episode-54>.

\$3m of its bonds back. Less than 1% of its customers leave, below the industry average.⁷⁵ The network has been operating in the black since July 2013.⁷⁶

LightTUBE offers low prices and a variety of service tiers as well. For Internet services, it provides 15 Mbps for \$52.95 per month, 1 Gbps for \$99.95 per month, and several speeds in between. LightTUBE also offers many tiers of TV service, ranging from \$19.95 per month to \$80.49 per month and more. Its telephone service costs \$31.95 per month. Customers save more money if they bundle multiple services.⁷⁷

3. LightTUBE has produced important local benefits.

The network provides many benefits to the local community. The network airs many local sports, including all high school football games, most high school basketball games, and a majority of baseball and softball games in HD. There have been no gimmick prices and no price increases. In fact, there have been many

⁷⁵ Allan Holmes, *How Big Telecom Smothers City-Run Broadband*, Center for Public Integrity (Aug. 28, 2014), <http://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband>.

⁷⁶ Lisa Gonzalez, *LightTUBE Financially Secure in Tennessee*, Muninetworks (Dec. 19, 2013), <http://www.muninetworks.org/content/lighttube-financially-secure-tennessee>.

⁷⁷ LightTUBE Pricing, Tullahoma Utilities Board (Apr. 27, 2015), <http://www.tub.net/files/docs/internet-rate-sheet-for-web.pdf>.

price decreases, some in the form of increased speed for the same price.

LightTUBE recently reduced its 1Gbps offering to \$99.95 per month, down from \$300 per month.⁷⁸ This was the sixth free speed increase since 2008.⁷⁹ In other cases, the network upgraded its speed tiers at no additional cost, such as when the network automatically upgraded all 300 Mbps customers to 1 Gbps in April 2013.⁸⁰ The network's Virtual Local Area Network (a way to directly connect separate computers and networks, such as in physically separate office buildings) service is fast and reliable. This service is important to business customers who have multiple offices, such as hospitals and doctors' offices.⁸¹

The network also provides significant competitive and economic benefits. Several companies have moved to Tullahoma. Agisent Technologies, Inc., a provider of online records management for police departments and city jails, moved to Tullahoma for its fast, reliable network capable of providing a backup

⁷⁸ Lisa Gonzalez, *LightTUBE Lowers the Price of a Gig; Increases Speeds for Free AGAIN*, Muninetworks (Dec. 17, 2014), <http://www.muninetworks.org/content/lighttube-lowers-price-gig-increases-speeds-free-again>; Andrea Agardy, *Tullahoma to Become 'Gigabit City'*, Tullahoma News (Apr. 25, 2013), <http://www.tullahomanews.com/tullahoma-to-become-gigabit-city>.

⁷⁹ *Id.*

⁸⁰ Agardy, *supra* note 78.

⁸¹ Community Broadband Bits Episode 54, *supra* note 74.

connection in case its primary connection failed. “Charter and AT&T couldn’t offer redundancy, but LightTUBE could.”⁸² 1st Choice Realtor, owned by Lisa Hayes and which employs fifteen people, said her sales have tripled in part thanks to LightTUBE’s reliability. Her prior Charter connection “would frequently crash and [the] response times were slow.”⁸³ The network’s business customers include big manufacturers, insurance agents, car dealerships, doctor’s offices, and mom and pop shops.⁸⁴

The Tullahoma job market has improved in part because of the network.⁸⁵ Prior to LightTUBE, Tullahoma lagged statewide job growth. Now, the city has outpaced job growth in Tennessee. “The city added 3,598 jobs from April 2009 to April 2014, a 1.63 percent annual growth rate, about double the statewide rate.”⁸⁶

Nearby and distant communities (such as Winchester, Lynchburg, and Manchester, all 10-15 miles away) are asking if Tullahoma plans to build its network beyond its city limits. While the city does not currently plan to extend the

⁸² Holmes, *supra* note 75.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* (citing Brookings Institute study that “found that for every one-percentage-point increase in the availability of broadband in a state, the number of jobs increased up to three-tenths of a percent per year. Faster broadband speeds likely have the same effect...).

⁸⁶ *Id.* (citing Bureau of Labor Statistics).

network that far, the city does wish to build “fiber a short distance and maybe pick up...some good customers...that offer some economic development value.”⁸⁷ For example, there is a machine shop “just outside of our service territory” and “they would like to have much better[,] more robust Internet. And we just don’t have the ability to do that.” Another example includes a “joint industrial park that’s about four miles from our service territory, that...the city of Tullahoma and the county and...Manchester have all put money into developing” and they have cable Internet. With “fiber out there...they could really go after technology companies that might want to come in there and open.”⁸⁸

II. CLAIMS OF MUNICIPAL BROADBAND “FAILURES” ARE GREATLY OVERSTATED AND IGNORE THE SUBSTANTIAL BENEFITS CONFERRED BY THOSE NETWORKS.

Amici for Petitioners attempt to argue that a handful of municipal networks have “failed” and have left taxpayers paying the bill, which they claim justifies states imposing barriers to municipal broadband deployment.⁸⁹ *Amici* focus exclusively on the costs of the network without acknowledgement or explanation

⁸⁷ Community Broadband Bits Episode 54, *supra* note 74.

⁸⁸ *Id.*

⁸⁹ National Governor’s Association Br. 21-22; Alabama *et al.* Br. 11-16; ALEC Br. 27-28.

of the benefits those networks continue to provide their communities.⁹⁰ While benefits may be more difficult to quantify than costs, ignoring benefits portrays the networks in an incomplete and misleading way.

At the outset, it is important to stress that broadband investment is a long-term investment in *infrastructure*. Infrastructure investment is well-known for high up-front costs, which are recouped over many years.⁹¹ Once invested, that infrastructure provides “long-term, continuing benefits.”⁹² Thus, *amici*’s cost analysis of municipal broadband investment is misleading unless it is viewed in the context of the benefits that have been realized.

Several of the networks cited by *amici* are fully functional today and provide significant benefits to their communities. For instance, Burlington Telecom (“BT”) in Burlington, VT, cited as a “failure” by National Governors Association,⁹³ remains a functioning, 100% fiber-optic network and continues to

⁹⁰ ALEC even describes Lafayette’s LUS Fiber as a failure, ALEC Br. 28, even though, as this brief describes in great detail above, it has provided myriad benefits to the public.

⁹¹ Michael Lind, *The Right Way to Invest in Infrastructure*, McKinsey & Co. (Dec. 2009), http://www.mckinsey.com/insights/public_sector/the_right_way_to_invest_in_infrastructure.

⁹² *Id.*

⁹³ National Governors Association Br. 22.

provide its subscribers extremely fast and reliable Internet connectivity at an extremely low cost.⁹⁴ The economic benefits that Burlington businesses and residents derive from having extremely high-speed fiber-optic service is difficult to quantify, but it is extremely important. Thanks to BT, Burlington residents can purchase a 1 Gbps connection for \$70 per month, or can save money on Internet, telephone, and television by subscribing to a triple-play package.⁹⁵ BT also has high customer satisfaction: according to one survey, 87 percent of subscribers indicated they were satisfied with their service.⁹⁶ Burlington residents are also harnessing the power of the fiber-optic network to

develop[] web applications that demonstrate the significance of the gigabit. For example, Bradley Holt and Jason Pelletier, leaders of a group of volunteer programmers known as Code for BTV, have used BT's gigabit network to create open data projects, as well a 'civic cloud.' The communal online storage center will house apps and enable high-definition video streaming.⁹⁷

⁹⁴ Any analysis of the costs of the BT network that does not account for the savings that Burlington residents receive from the lower cost service is incomplete.

⁹⁵ Burlington Telecom 2015 Residential Pricing Sheet, <http://www.burlingtontelecom.net/uploads/2015NewPricingPromo.pdf>.

⁹⁶ Erin Mansfield, *KeepBTLocal Plans to Buy Burlington Telecom*, VTDigger (June 15, 2015), <http://vtdigger.org/2015/06/15/keepbtlocal-plans-to-buy-burlington-telecom>.

⁹⁷ Alicia Freese, *Meet the Brit Who Turned Around Burlington Telecom*, Seven Days (Dec. 10, 2014), <http://www.sevendaysvt.com/vermont/meet-the-brit-who-turned-aroundburlington-telecom/Content?oid=2484411>.

The current manager of BT also plans to create substantial

“economic...and...community development.”⁹⁸

iProvo, in Provo, UT, cited as a “failure” by National Governors Association,⁹⁹ similarly provides significant benefits to Provo citizens. *Amici* attempt to argue that Provo’s sale of its network to Google Fiber for one dollar shows the network was a “failure.”¹⁰⁰ Quite the contrary, Provo built the network that brought Google Fiber, an immensely popular and high-value service, to the citizens of Provo.¹⁰¹ In fact, Provo is only one of *three* cities in the U.S. where Google currently offers the acclaimed service.¹⁰² Provo also worked out favorable terms for the sale. Google Fiber agreed to (1) upgrade the network to gigabit speeds, (2) provide anyone with iProvo service *free* Internet service (after a \$30 activation fee), (3) provide new customers with *free* service (after paying a \$300 fee), and (4) provide state-of-the-art gigabit service for free at twenty-five

⁹⁸ *Id.*

⁹⁹ National Governors Association Br. 21.

¹⁰⁰ *Id.*

¹⁰¹ Sam Gustin, *5 reasons you want Google Fiber in your city*, CNN (Apr. 12, 2013), <http://www.cnn.com/2013/04/11/tech/innovation/google-fiber-austin-cities>.

¹⁰² Expansion Plans, Google Fiber, <https://fiber.google.com/newcities>.

locations.¹⁰³ Google’s gigabit service costs only \$70 per month, which is about what most cable systems charge for ordinary 50 Mbps service. A combination of Internet and cable TV service costs approximately \$130 per month.¹⁰⁴

Another Utah network, UTOPIA (“Utah Telecommunications Open Infrastructure Agency”) was also cited by *amici* as a “failure.”¹⁰⁵ Their arguments primarily focused on high debt, low cash flow, and the attempted public-private partnership between the network and Australia-based firm Macquarie.¹⁰⁶ These arguments, too, are an oversimplification and fail to address the substantial benefits the network has provided. First, the network is fully operative and provides high-speed broadband access to its subscribers every day. The UTOPIA network has been providing broadband Internet access to communities that “may not have had such service otherwise.”¹⁰⁷ Further, the network was recently upgraded, allowing customers on the 100Mbps tier to upgrade to 250Mbps at no extra cost.¹⁰⁸ Second,

¹⁰³ Google Fiber, City of Provo, <http://www.provo.org/about-us/current-issues/google-fiber>; Plans and Pricing, Google Fiber, <https://fiber.google.com/cities/provo/plans>.

¹⁰⁴ Plans and Pricing, Google Fiber, <https://fiber.google.com/cities/provo/plans>.

¹⁰⁵ ALEC Br. 28; Alabama, *et al.* Br. 11-13.

¹⁰⁶ Alabama, *et al.* Br. 12.

¹⁰⁷ *21st Century Infrastructure*, Utah Foundation (Oct. 2015), at 6, <http://www.utahfoundation.org/uploads/rr732.pdf>.

¹⁰⁸ Jesse Harris, *The Need for Speed: UTOPIA Bumping 100Mbps Tiers to 250Mbps*, FreeUTOPIA! (Nov. 6, 2015),

the network's financial situation is not as bad as opponents claim.¹⁰⁹ The network is not losing money, it has been growing revenue by approximately \$10,000 per month for the past 3.5 years.¹¹⁰

With a full analysis of the benefits these networks continue to provide their communities, the cost-benefit analysis shows the networks are remarkably successful.

CONCLUSION

The vast majority of municipal broadband networks have succeeded and continue to provide important benefits to the communities they serve. The examples above are illustrative of the overall trend of successful municipal networks. The state laws at issue in the *Order* hinder the emergence and deployment of municipal networks, hurting citizens that currently lack access to high-speed broadband. For these reasons, the FCC correctly preempted Tennessee and North Carolina state law, and the Court should uphold the *Order*.

<http://www.freeutopia.org/2015/11/06/the-need-for-speed-utopia-bumping-100mbps-tiers-to-250mbps>.

¹⁰⁹ Alabama, *et al.* Br. 11-12.

¹¹⁰ Jesse Harris, *A UTOPIA Update: More network, more money*, FreeUTOPIA! (Oct. 15, 2015), <http://www.freeutopia.org/2015/10/15/a-utopia-update-more-network-more-money>; *21st Century Infrastructure*, *supra* at 6.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

The undersigned hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman size 14.

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CERTIFICATE OF SERVICE

I, Eric Null, hereby certify that on November 12, 2015, I filed the foregoing Brief of *Amicus Curiae* for Benton Foundation *et al.* with the Clerk of the Court of Appeals for the Sixth Circuit through the CM/ECF system and it was served electronically through that system.

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