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## **WSJ Opinion: Tom Wheeler's Other Web Takeover.**

This week Federal Communications Commission chairman Tom Wheeler plans to seize regulatory control over the Internet by declaring private broadband carriers to be public utilities. Less well known is that he also wants to usurp state authority to regulate municipal broadband networks.

Local governments are forever seeking opportunities to diversify their, er, investments in sports stadiums, convention centers and such. Many lately have been getting into broadband. Municipalities have built some 180 fiber-optic networks in addition to about 75 cable services. Most operate as de facto public utilities with an implicit, if not explicit, taxpayer backstop.

President Obama last month hailed the municipal gigabit fiber optic network in Cedar Falls, Iowa, as an exemplar of public broadband's potential to increase connectivity, spur competition and drive economic growth. Yet his laments of market failure are overwrought, and his anecdote of government success comes with caveats.

According to a report last year by New York Law School, the number of high-speed broadband lines more than doubled between June 2009 and December 2012, while the percentage of Census districts with one or fewer fixed broadband providers fell to 1.2% from 3.5%. Broadband cable prices plunged to \$1.10 per megabit per second in 2013 from \$19 in 1998.

Google's gigabit fiber-optic network is already available in Kansas City, Austin, and Provo, Utah, and is expanding into Atlanta, Nashville, Raleigh-Durham and Charlotte. With gigabit speed, a user can download a song in less than a tenth of a second. Most Internet users don't require more than 10 megabits for downloads, and consumers don't want to pay more for speeds they don't need.

Rather than driving competition, municipal broadband can undercut the private market. Because they benefit from public financing and right-of-way, munis can price services below private carriers. Like other cities, Cedar Falls financed its broadband via tax-exempt municipal bonds, loans from the public electric utility and federal grants.

This puts taxpayers and in some cases electric-utility ratepayers on the hook if the ventures go belly up. Taxpayers in Monticello, Minnesota, had to bail out their government-run FiberNet after it defaulted on municipal bonds. The publicly financed network in Groton, Connecticut, was sold to private investors at a \$30 million loss. Google paid \$1 for the failed municipal broadband enterprise in Provo, which cost taxpayers \$60 million. Largely because of these risks, 21 states impose restrictions on municipal broadband, which range from requiring public hearings to outright bans.

Enter the FCC's Mr. Wheeler. Last summer, Wilson, North Carolina, and Chattanooga, Tennessee, petitioned the FCC to override state limits on expanding their networks to outlying communities under Section 706 of the 1996 Telecommunications Act.

Section 706's boilerplate text instructs the FCC and states to "encourage the deployment on a reasonable and timely basis 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.”

Mr. Wheeler has interpreted this vague language as a federal mandate to pre-empt state laws restricting government broadband. He asserts that public broadband is necessary and in the public interest because “commercial broadband providers can pick and choose who to serve based on whether there is an economic case for it.”

Yet under the federalist system and the Constitution’s Tenth Amendment, states have sovereign authority to regulate their municipalities. The Supreme Court has affirmed that “if Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”

Yet nowhere in Section 706 is the FCC explicitly authorized to pre-empt state laws regulating municipal broadband. In *Nixon v. Missouri Municipal League* (2004), the Supreme Court rejected federal pre-emption of a state ban on municipal telecom services.

Mr. Wheeler is trying to end-run this ruling by appealing to the FCC’s mandate to “promote competition” and “remove barriers to infrastructure investment.” But if the Labor Department construed its mandate to “foster, promote, and develop the welfare” of workers as broadly, the feds could nullify state laws that forbid cities from raising their minimum wage or restrict collective bargaining for local government workers.

Mr. Wheeler may figure that liberal ends justify illiberal means, but he is threatening serious damage to the federal system and local self-government.

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