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A Critique of the ACLU’s “Public Internet Option” Study

by

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I. Introduction and Summary

A new report by the American Civil Liberties Union entitled “The Public Internet Option: How Local Governments Can Provide Network Neutrality, Privacy, and Access for All” calls for more municipal governments to create their own broadband networks. The ACLU claims this will close the digital divide and also promote certain “net neutrality” policies supported by the ACLU. In its report, the ACLU purports to set up a contrast between private broadband providers who don’t respect First Amendment and privacy rights and government-run broadband systems that can be trusted to protect the rights of their users.

As shown below, however, this comparison in “The Public Internet Option” is not based on actual evidence. Instead, it is based on wishful assumptions by the ACLU, ignoring actual evidence of the conduct of municipal broadband providers, and heavy reliance on promises the ACLU hopes municipal networks will make regarding how they will protect the rights of their users. Indeed, there is substantial evidence that private providers are promoting the very values identified in the ACLU report better than municipal providers.

The ACLU also shows a surprising willingness to suspend its usual concerns about governments handling large volumes of sensitive customer data and instead settle for

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promises from local governments that they will follow net neutrality policies favored by the ACLU. As a prominent Free State Foundation scholar [points out](#), local governments often loudly proclaim that they favor net neutrality policies while employing terms of service for their own government-run networks that are wholly inconsistent with those restrictions and which are likely violative of the First Amendment.

“The Public Internet Option” tries to make its case for municipal broadband providers being superior to private providers by setting forth three principles that should be used for making such comparisons. Much of the ACLU report is then organized around three principles:

1. High-speed broadband must be accessible and affordable for all.
2. Community broadband services must protect free speech.
3. Community broadband services must protect privacy.

Even if one accepts these three principles as the criteria for deciding whether public policy should favor government-owned broadband systems, “The Public Interest Option” fails to demonstrate that government-owned broadband systems perform better than private broadband systems. This *Perspectives* shows how the evidence cited in the report by the ACLU for the proposition that government-run systems are more accessible and affordable is highly dubious, and the track records for government-run broadband systems protecting free speech and privacy are not better, and may be significantly worse, than for privately run systems.

The underlying principle asserted by the ACLU in “The Public Internet Option” is that broadband should be available to everyone. In this regard, the ACLU appears to be in agreement with FCC Chairman Ajit Pai. After being named Chairman of the FCC in January of 2017, Chairman Pai announced that his top priority would be to close the digital divide, the gap between those who use broadband access and those who do not. Chairman Pai [reiterated his commitment to closing the digital divide](#) last week in his remarks at the Free State Foundation’s Tenth Annual Telecom Policy Conference. But adding municipal broadband systems is not the only way to close the digital divide, and in most cases is not the best option for local governments.

When a community has a municipal broadband network, the local government is both a competitor and a regulator, which often leads to municipalities using their regulatory powers to harm private providers that may compete with the government-owned utilities. These conflicts of interest arise because municipal broadband networks often are subsidized directly by the taxpayers or backed by government bond issues, giving local regulators a strong interest in making sure they do not fail. This risk is well-known to private providers considering expanding into markets that have or may soon have municipal broadband systems.

These local regulatory policies are an important contributor to the lack of customer choice in private broadband providers the ACLU complains about in “The Public Internet Option.”

Municipal broadband providers are often granted special privileges, such as favored rights-of-way treatment. There is also the risk of local governments excusing municipal broadband networks from running the bureaucratic gantlet of permitting and licensing processes through which private providers must pass or from paying the fees that typically accompany such permits and licenses.

If, as is likely, a municipal provider displaces one or more private providers that would otherwise build in the market, the net effect will be the same number or fewer broadband providers in the market. In this way, having a municipal broadband provider will generally lead to less access, not more, contrary to the claims in “The Public Interest Option.”

As for affordability, the ACLU report relies almost entirely on a recent study by authors affiliated with Harvard University’s Berkman Klein Center for Internet & Society (Berkman Klein study). The Berkman Klein study purports to show that community owned broadband systems “tend to provide lower prices for their entry-level broadband service than do private telecommunications companies, and are clearer about and more consistent in what they charge. They may help close the “digital divide” by providing broadband at prices more Americans can afford.”

Free State Foundation Research Fellow Michael Horney and I provided a [critical review](#) of the Berkman Klein study earlier this year. To summarize, we found the Berkman Klein study to be unreliable because its findings were based on a very small sample size; it failed to consider any data from several major providers, including Time Warner Cable, AT&T, and Verizon who were present in many of the markets in the sample; it failed to consider “bundling” discounts that are often available from private broadband providers; and it failed to consider how most of the municipal broadband providers included in the sample are facing serious financial viability problems, which means they are being subsidized by their local governments.

The second criterion “The Public Internet Option” proposes to use to compare private broadband to government-run broadband systems is protection of free speech rights. The ACLU report asserts only three alleged examples of private broadband systems infringing on free speech rights, but the two that occurred in the United States do not appear to be speech restrictions at all. It should be noted that the First Amendment limits the actions of government agencies that run municipal broadband networks but does not apply to private providers.

Importantly, there is a history of speech infringement by municipal broadband systems. Enrique Armijo, Associate Dean for Academic Affairs and Associate Professor of Law at Elon University School of Law, and a member the Free State Foundation Board of Academic Advisors, has written extensively regarding how many government-run broadband networks have poor track records in protecting free speech rights. In his review of actual terms of service imposed by many of the same municipal broadband systems cited in the ACLU report, Armijo concludes:

These terms of service decidedly are not examples of network neutrality. These government-owned networks severely restrict users' speech on the network in exchange for access – and in doing so, facially violate the First Amendment in any other context. First Amendment doctrine in the United States makes clear that outright bans on protected speech – even indecent speech, let alone “excessive,” “derogatory,” “abusive,” or “hateful” speech – are never sufficiently narrowly tailored to survive constitutional scrutiny. It is also black-letter free speech law that prior restraints – and there is no question that a network operator's “rejecting or removing” material because of its content before that material reaches its intended recipient is a prior restraint, as is the case here – are presumed unconstitutional. And the right to speak anonymously is well enshrined in the Speech Clause's protections as well. Terms of service such as those used in Chattanooga, Wilson, and potentially scores of other cities thus violate basic tenets of First Amendment law, let alone the principle that network providers should not block or throttle speech because of what it says.

Regarding the third criterion, protecting privacy, the ACLU has a long history of concern about the misuse of data and invasion of privacy by government agencies. Yet in “The Public Internet Option,” the ACLU largely abandons its critical assessment of privacy protection practices by the local governments that run broadband networks. The ACLU report makes no attempt to show that municipal providers have in practice protected privacy better than private municipal broadband providers.

In a 2014 law journal article, Professor Armijo pointed out that the presumption that government-run broadband networks will do a better job of protecting privacy than private providers is strongly contradicted by government agencies' track record:

[T]he Internet has boosted the power and efficiency of the government's mass surveillance apparatus such that any presumptions concerning the privacy of online speech have been overwhelmed by the State's technological ability to monitor, amass, and crunch personal data. Based on what we now know of the surveillance state, the question of whether the government can collect information shared online is moot; the debate has already turned to setting the proper limits on its use of that information. In light of these sobering developments, one could easily conclude that the last thing we should be doing is enabling or encouraging governments to provide online networks for us to use for speech.

The conclusion in the ACLU report that government-run broadband systems have an advantage over privately run systems when it comes to protecting privacy is based on nothing more than its reliance on proposed commitments that the ACLU hopes municipal systems will adopt. This trust is misplaced. Actual municipal broadband providers in practice have often fallen far short of the standards the ACLU report assumes they will follow, and there is good reason to believe they will fall short in the future.

“The Public Internet Option” concludes by saying “communities that don't offer internet services should consider doing so as a way of advancing those values [of making Internet service accessible and affordable while protecting free speech and privacy rights].” However,

the ACLU report fails to show that municipal broadband systems promote those values better than private broadband providers. On the contrary, there is substantial evidence that private providers are promoting the very values identified in the ACLU report better than municipal providers.

II. The ACLU’s “The Public Internet Option” Report

The author of “The Public Internet Option: How Local Governments Can Provide Network Neutrality, Privacy, and Access for All” is Jay Stanley, a senior policy analyst with the ACLU Speech, Privacy, and Technology Project.¹ The ACLU report tries to portray, with little evidentiary support, private broadband providers as being in the business of depriving their customers of their free speech and privacy rights.

“The Public Internet Option” includes many derogatory claims about the motives and business practices of private broadband providers. For example:

If the commercial providers are determined to make money by violating the privacy and speech rights of their users, and if some policymakers in Washington are determined to clear the way for them to do that — then states, cities, towns, and counties should take matters into their own hands by creating publicly owned services that do honor those values and can help ensure an open internet.²

The ACLU report later asserts:

But what innovations are the carriers going to produce by being allowed to monitor and distort their customers’ traffic? Most likely: becoming better at spying on and manipulating data to extract profits.³

And:

Big telecoms that control the one or two viable internet options in a community can add to their profits by gathering and selling data on their customers’ web surfing, application usage, daily activity patterns, and no doubt many other “innovative” sources of information about them.⁴

As is evident, the ACLU is attempting to set up a contrast between greedy private broadband providers who don’t respect First Amendment and privacy rights and government-run broadband systems that can be trusted to protect the rights of their users. As shown below, however, this comparison in “The Public Internet Option” is not based on actual evidence. Instead, it is based on wishful assumptions by the ACLU, ignoring actual evidence of the

¹ Jay Stanley, “The Public Internet Option: How Local Governments Can Provide Network Neutrality, Privacy, and Access for All,” American Civil Liberties Union (March 29, 2018), available at:

https://www.aclu.org/sites/default/files/field_document/aclu_municipal_broadband_report.pdf.

² “The Public Internet Option,” p. 5.

³ “The Public Internet Option,” p. 5.

⁴ “The Public Internet Option,” p. 6.

conduct of broadband providers, and heavy reliance on promises the ACLU hopes municipal networks will make regarding how they will protect the rights of their users.

“The Public Internet Option” tries to make its case for municipal broadband providers being superior to private providers by setting forth three principles that should be used for making such comparisons:

1. High-speed broadband must be accessible and affordable for all.
2. Community broadband services must protect free speech (and presumably private providers too).
3. Community broadband services must protect privacy (and presumably private providers as well).⁵

Even if one accepts these three principles as the criteria for deciding whether public policy should favor government-owned broadband systems, “The Public Interest Option” fails to demonstrate that government-owned broadband systems perform better than private broadband systems. The sections that follow show how the evidence cited in the report that claim to show that government-run systems are more accessible and affordable is highly dubious, and the track records for government-run broadband systems protecting free speech and privacy are not better, and may be significantly worse, than for privately run systems.

III. High-Speed Broadband Accessibility and Affordability

The underlying principle asserted by the ACLU in “The Public Internet Option” is that broadband should be available to everyone:

When the internet was first popularized in the 1990s, it was often called the “Information Superhighway” — an apt metaphor. Just as the roads and sidewalks are open to all, so too must the internet be available to all. Community broadband should not be deployed principally to serve businesses and the affluent. It must be equally accessible to residents of rural and low-income areas and communities of color.⁶

In this regard, the ACLU appears to be in agreement with FCC Chairman Ajit Pai. In his first remarks after being named Chairman of the FCC in January 2017, Chairman Pai announced that his top priority would be to close the digital divide, the gap between those who use broadband access and those who do not.⁷ Chairman Pai reiterated his commitment to closing the digital divide last week in his remarks at the Free State Foundation’s Tenth Annual Telecom Policy Conference.⁸

⁵ “The Public Internet Option,” p. 6.

⁶ “The Public Internet Option,” p. 12.

⁷ Ajit Pai, “Remarks of FCC Chairman Ajit Pai,” (January 24, 2017) available at:

http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0124/DOC-343184A1.pdf.

⁸ Ajit Pai, “Opening Keynote Address,” Free State Foundation Tenth Annual Telecom Policy Conference (March 27, 2018), video recording available at <http://freestatefoundation.blogspot.com/2018/03/catch-c-spans-video-of-fsfs-tenth.html>.

The ACLU's basis in "The Public Internet Option" for claiming that municipal broadband systems make broadband available to more people appears to be nothing more than pointing out that the municipal provider will be another provider in the market. However, "The Public Internet Option" ignores how local regulations imposed by municipalities are often an important contributing factor in keeping private providers from building networks in their jurisdictions.

As FSF scholars have discussed previously, local governments have often created an uneven regulatory playing field that gives government-run or government-assisted broadband networks significant advantages over private providers.⁹ When a community has or is considering building a municipal broadband network, the local government is both a competitor and a regulator, which often leads to municipalities using their regulatory powers to harm private providers that may compete with the government-owned utilities. These conflicts of interest arise because municipal broadband networks are often subsidized directly by the taxpayers or backed by government bond issues, giving local regulators a strong interest in making sure they do not fail. This risk is well known to private providers considering expanding into markets that have or may soon have municipal broadband systems.¹⁰

These local regulatory policies are an important contributor to the lack of customer choice in private broadband providers the ACLU complains about in "The Public Internet Option." Municipal broadband providers are often granted special privileges, such as favored rights-of-way treatment.¹¹ There is also the risk of local governments excusing municipal broadband networks from running the bureaucratic gantlet of permitting and licensing processes through

⁹ Michael J. Horney, "Local Governments Should Focus on 5G Smart Cities, Not Municipal Broadband," *FSF Blog*, (February 20, 2018), available at: <http://freestatefoundation.blogspot.com/2018/02/local-governments-should-promote-5g.html>; Theodore R. Bolema and Michael J. Horney, "The Problem with Municipal Broadband and Solutions for Promoting Private Investment," *Perspectives from FSF Scholars* Vol. 12, No. 21 (June 21, 2017), available at: http://www.freestatefoundation.org/images/The_Problem_with_Municipal_Broadband_and_Solutions_for_Promoting_Private_Investment_062017.pdf; Theodore R. Bolema and Michael J. Horney, "A Critical Assessment of the 'Community-Owned Fiber Networks: Value Leaders in America' Study," *Perspectives from Free State Foundation Scholars* Vol. 13, No. 4 (January 30, 2018), available at: http://www.freestatefoundation.org/images/The_Problem_with_Municipal_Broadband_and_Solutions_for_Promoting_Private_Investment_062017.pdf.

¹⁰ A 2017 study by Professor Christopher Yoo of the University of Pennsylvania, a member of FSF's Board of Academic Advisers, and Timothy Pfenninger of the University of Pennsylvania found that the financial performance of municipal broadband systems generally is quite dismal. Christopher Yoo and Timothy Pfenninger, "Municipal Fiber in the United States: An Empirical Assessment of Financial Performance," University of Pennsylvania Law School's Center for Technology, Innovation and Competition (May 2017), available at: <https://www.law.upenn.edu/live/files/6611-report-municipal-fiber-in-the-united-states-an> ("A closer examination of specific projects reveals that the risks and consequences are quite real. Many cities managing these projects have faced defaults, reductions in bond ratings, and ongoing liability, not to mention the toll that troubled municipal broadband ventures can take on city leaders in terms of personal turmoil and distraction from other matters important to citizens. City leaders should carefully assess all of these costs and risks before permitting a municipal fiber program to go forward").

¹¹ Randolph J. May and Seth L. Cooper, "Comments of the Free State Foundation, Petition Seeking Preemption of Certain State Restriction on Municipal Broadband Networks" (August 29, 2014), pp. 1-3, available at: http://www.freestatefoundation.org/images/Muni_Broadband_Comments_082814.pdf.

which private providers must pass and from paying the fees that typically accompany the permits and licenses.¹² For example, when Traverse City, Michigan, was considering a municipal broadband project in 2017, a private company serving other nearby markets complained that it was forced to abandon plans to enter the Traverse City market when the city added so many restrictions and requirements that the investment no longer made sense.¹³ As Free State Foundation Research Fellow Michael Horney explains:

“[I]f not for regulatory barriers at the local, state, and federal levels, most broadband providers would invest more than they already do, thereby extending their service areas even further. For example, a 2005 AEI-Brookings study found that states with laws that guarantee telecommunications companies access to rights-of-way have broadband penetration that is about 10 percent higher than states that do not guarantee access. Similarly, penetration rates were lower when these guarantees were not extended to cable companies. Greater access to rights-of-way and more capital investment would have helped deploy broadband in more rural and underserved areas than are served currently.”¹⁴

It should also be noted that “The Public Internet Option” limits its consideration of broadband availability to fixed wireline services. But wireline broadband is not the only way to reach unserved and underserved areas. Several other technologies, including fixed wireless, satellite, and wireless, are now available or soon will be in many markets that meet or exceed the FCC minimum speed requirements to be considered broadband services. Michael Horney provided a recent analysis of the status of the digital divide, alternative technologies besides wireline broadband that can reach more Americans with broadband that meets the FCC definition, and policies that would encourage even faster deployment.¹⁵

If, as is likely, a municipal provider displaces one or more private providers that would otherwise build in the market, the net effect will be the same number or fewer broadband providers in the market. In this way, having a municipal broadband provider will generally lead to less access, not more, contrary to the claims in “The Public Interest Option.”

As for affordability, the ACLU report relies almost entirely on a recent study by authors affiliated with Harvard University’s Berkman Klein Center for Internet & Society (Berkman

¹² “Comments of the Free State Foundation, Petition Seeking Preemption of Certain State Restriction on Municipal Broadband Networks,” p. 2.

¹³ Michael Van Beek and Jarrett Skorup, “Utility Pushes Risky Taxpayer-Funded Initiative,” *Traverse City Record-Eagle* (Jun 25, 2017), available at: http://www.record-eagle.com/opinion/op-ed-utility-pushes-risky-taxpayer-funded-initiative/article_87bdf088-5ff6-5a7a-abe6-c0c11bbdf518.html.

¹⁴ Michael J. Horney, “Reaching Rural America: Free Market Solutions for Promoting Broadband Deployment,” *Perspectives from FSF Scholars* Vol. 13, No. 10 (March 19, 2018), p. 14, available at: http://www.freestatefoundation.org/images/Reaching_Rural_America_Free_Market_Solutions_for_Promoting_Broadband_Deployment_031918.pdf, citing Scott Wallsten, “Broadband Penetration: An Empirical Analysis of State and Federal Policies,” AEI-Brookings Joint Center for Regulatory Studies Working Paper No. 05-12, June 2005, p. 3, available at: <https://www.heartland.org/template-assets/documents/publications/17468.pdf>.

¹⁵ Michael J. Horney, “Reaching Rural America: Free Market Solutions for Promoting Broadband Deployment,” *Perspectives from FSF Scholars* Vol. 13, No. 10 (March 19, 2018), available at: http://www.freestatefoundation.org/images/Reaching_Rural_America_Free_Market_Solutions_for_Promoting_Broadband_Deployment_031918.pdf.

Klein study).¹⁶ The only other evidence of affordability cited in “The Public Interest Option” are two articles the ACLU claims show that broadband is more expensive in the United States than in certain other countries. These articles appear to be irrelevant to any claim that broadband from municipal providers is more affordable than broadband from private providers.¹⁷

In the Berkman Klein study, the authors claim:

Our study, though limited in scope, contains a clear finding: community-owned FTTH [fiber-to-the-home] networks tend to provide lower prices for their entry-level broadband service than do private telecommunications companies, and are clearer about and more consistent in what they charge. They may help close the “digital divide” by providing broadband at prices more Americans can afford.¹⁸

Michael Horney and I have provided a critical review of the Berkman Klein study.¹⁹ Several other scholars have also examined the methodology and findings from the Berkman Klein study, and found them unpersuasive.²⁰ Interested readers can consult our paper for the details of our critique. To summarize, we found the Berkman Klein study to be unreliable because its findings were based on a very small sample size of 27 markets (which includes one in which the municipal provider was recently sold to a private provider). The Berkman Klein study also failed to consider any data at all from several major providers, including Time Warner Cable, AT&T, and Verizon which were present in many of the 27 markets; failed to consider “bundling” discounts that are often available from private broadband providers; and failed to consider how most of the municipal broadband providers included in the sample are facing serious financial viability problems, so that they in effect are being subsidized by their local governments.

“The Public Internet Option” contains no original analysis of affordability of municipal broadband, so its findings are no more reliable than the Berkman Klein analysis. For these reasons, the ACLU study has failed to demonstrate that broadband from municipal providers is more accessible and affordable than broadband from private providers, and substantial evidence can be found showing the opposite result.

¹⁶ David A. Talbot, Kira Hope Hessekiel, and Danielle Leah, “Community-Owned Fiber Networks: Value Leaders in America,” Berkman Klein Center for Internet & Society (January 2018), available at: <https://dash.harvard.edu/handle/1/34623859>.

¹⁷ “The Public Internet Option,” p. 12.

¹⁸ Berkman Klein study, p. 6.

¹⁹ Theodore R. Bolema and Michael J. Horney, “A Critical Assessment of Harvard’s ‘Community-Owned Fiber Networks: Value Leaders in America Study,’” *Perspectives from FSF Scholars* Vol. 13, No. 4 (January 31, 2018), available at:

http://www.freestatefoundation.org/images/A_Critical_Assessment_of_Harvard_s_Community-Owned_Fiber_Networks_-_Value_Leaders_in_America_Study_013118.pdf

²⁰ See, e.g., Richard Bennet, “Community Broadband Is Cheaper—and Slower,” High Tech Forum, (January 16, 2018), available at: <http://hightechforum.org/community-broadband-cheaper-slower>; Michael J. Santorelli and Charles M. Davidson, “A Closer Look: Berkman’s Municipal Fiber Pricing Study (January, 2018), available at <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2018/01/Closer-Look-Berkman-GON-Pricing-Study-January-2018.pdf>.

IV. Broadband Service Providers and Free Speech

The second criterion “The Public Internet Option” proposes to use to compare private broadband to government-run broadband systems is the protection of free speech rights. However, the ACLU report provides only three alleged examples of private broadband systems infringing on free speech rights:

Unfortunately there are numerous examples of internet service providers secretly hiding and blocking access to certain online content. In Canada, workers investigating which labor union they might want to join were thwarted for a brief time in 2005. Their ISP hid access to the website of a key telecommunications workers union with which it was locked in a political fight. In 2014, Comcast intentionally slowed, or “throttled” all traffic passing through the Netflix service, holding the company and its users hostage until Netflix paid Comcast higher fees for access. Similarly, AT&T in 2012 blocked its users’ access to the online application FaceTime, which it considered a competitor (internal citations omitted).²¹

Thus, one of the ACLU’s three examples is from Canada in 2005 by a company that does not operate in the United States. The other two are alleged examples of “throttling,” or “blocking” the traffic of a competing service. Throttling or blocking were prohibited as “net neutrality” violations by the *Open Internet Order*, and after the *Restoring Internet Freedom Order* can be investigated by the Federal Trade Commission under its consumer protection authority.²² But throttling and blocking, if either does occur, are not necessarily speech infringements at all, and instead are, if anything, unfair business practices. Of course, it should be noted that the First Amendment limits the actions of government agencies but does not apply to private providers. Thus, “The Public Internet Option” falls far short of showing that paltry speech restrictions cited by private broadband providers are a systemic problem, or even that they occur at all.

In contrast, there is a significant history of free speech infringement by municipal broadband systems. Enrique Armijo, Associate Dean for Academic Affairs and Associate Professor of Law at Elon University School of Law, and a member of Free State Foundation Board of Academic Advisors, has written extensively on how government-run broadband networks have poor track records in protecting free speech and privacy rights. He recently wrote:

[T]he record of local governments so far, at least with respect to the conditions they place on the speech traffic that is carried over their *own* municipal broadband networks, is decidedly mixed. Thus, there is considerable irony, even hypocrisy, in their plea that private Internet service providers be prohibited from engaging in

²¹ “The Public Internet Option,” p. 14.

²² See, e.g., Theodore R. Bolema, “Recent Claims of Internet “Throttling” Do Not Justify a Bright-Line Ban,” *Perspectives from FSF Scholars* Vol. 12, No. 32 (September 20, 2017), available at http://www.freestatefoundation.org/images/Recent_Claims_of_Internet_Throttling_Do_Not_Justify_a_Bright-Line_Ban_092017.pdf.

blocking or otherwise restricting content while they proclaim that they may engage in the very same practices (internal citation omitted, emphasis in original).²³

In his review of actual terms of service imposed by many of the same municipal broadband systems cited in the ACLU report, Armijo concludes:

These terms of service decidedly are not examples of network neutrality. These government-owned networks severely restrict users' speech on the network in exchange for access – and in doing so, facially violate the First Amendment in any other context. First Amendment doctrine in the United States makes clear that outright bans on protected speech – even indecent speech, let alone “excessive,” “derogatory,” “abusive,” or “hateful” speech – are never sufficiently narrowly tailored to survive constitutional scrutiny. It is also black-letter free speech law that prior restraints – and there is no question that a network operator's “rejecting or removing” material because of its content before that material reaches its intended recipient is a prior restraint, as is the case here – are presumed unconstitutional. And the right to speak anonymously is well enshrined in the Speech Clause's protections as well. Terms of service such as those used in Chattanooga, Wilson, and potentially scores of other cities thus violate basic tenets of First Amendment law, let alone the principle that network providers should not block or throttle speech because of what it says (internal citations omitted).²⁴

In another FSF paper entitled “Municipal Broadband Networks Present Serious First Amendment Problems,” Professor Armijo quotes the conditions of service imposed by the Chattanooga municipal broadband utility's “Acceptable Use Policy”:

- Users are barred from using the network to “transmit, distribute, or store material . . . that is,” in addition to illegal, “obscene, threatening, abusive or hateful,” or that offends “the privacy, publicity or other personal rights of others.”
- Nor may users of the network “post messages” on third-party blogs “that are excessive and/or intended to annoy or harass others” – “regardless of [the] policies” of the blogs on which the users post.
- The utility operating the network also “reserves the right to reject or remove any material residing on or transmitted to or through” the network that violates the Acceptable Use Policy.²⁵

²³ Enrique Armijo, “A Case of Hypocrisy: Government Network Censors Support Net Neutrality for Private ISPs,” *Perspectives from FSF Scholars* Vol. 13, No. 1 (January 3, 2018), p. 2, available at: http://www.freestatefoundation.org/images/A_Case_of_Hypocrisy_-_Government_Network_Censors_Support_Net_Neutrality_for_Private_ISPs_010318.pdf.

²⁴ Enrique Armijo, “A Case of Hypocrisy: Government Network Censors Support Net Neutrality for Private ISPs,” *Perspectives from FSF Scholars* Vol. 13, No. 1 (January 3, 2018), p. 6, available at: http://www.freestatefoundation.org/images/A_Case_of_Hypocrisy_-_Government_Network_Censors_Support_Net_Neutrality_for_Private_ISPs_010318.pdf.

²⁵ Enrique Armijo, “Municipal Broadband Networks Present Serious First Amendment Problems,” *Perspectives from FSF Scholars* Vol. 10, No. 11 (February 23, 2015), p. 2, available at: http://www.freestatefoundation.org/images/Municipal_Broadband_Networks_Present_Serious_First_Amendment_Problems_022015.pdf.

Similarly, Professor Armijo points out how the ban on anonymous speech in the terms of service for Project Greenlight, the municipal broadband system in Wilson, North Carolina, directly conflicts with the U.S. Supreme Court’s consistently declared protections for such speech.²⁶

Professor Armijo concludes “One does not need to be a free speech scholar, or even a lawyer, to be troubled by these provisions. First Amendment doctrine makes clear that outright government bans on protected speech – even indecent speech, let alone ‘excessive,’ ‘derogatory,’ ‘harassing,’ ‘abusive,’ or ‘hateful’ speech – are never narrowly tailored enough to survive strict scrutiny.”²⁷ Thus, it is hard to see how, based on the evidence of their past performance, municipal broadband systems operated by governments can be considered more likely to better protect free speech rights than private broadband providers.

V. Broadband Service Providers and Privacy Protections

At a time when Facebook and other leading Internet online content firms are facing strong allegations of misusing private data acquired from Americans, perhaps it is understandable that the ACLU would be concerned about online privacy. However, most of the federal policy focus of “The Public Internet Option” is on the regulation of Internet service providers like Comcast and AT&T, and particularly on the FCC’s *Restoring Internet Freedom Order*²⁸ that ended the public utility-style regulation of Internet service providers (ISPs) created by the 2015 *Open Internet Order*.²⁹ Notably, much of the complaint about private companies failing to protect free speech and privacy rights in “The Public Internet Option” is based on the ending of the *Open Internet Order*, but the *Open Internet Order* did not apply to Facebook or the other large Internet firms that have been at the center of the recent data privacy concerns.³⁰

The American Civil Liberties Union has a long history of being concerned about the misuse of data and invasion of privacy by government agencies. The ACLU describes why it is so concerned about privacy protections and its role in combatting privacy intrusions by federal, state and local government agencies on its website:

Privacy today faces growing threats from a growing surveillance apparatus that is often justified in the name of national security. Numerous government agencies – including the National Security Agency, the Federal Bureau of Investigation, the Department of Homeland Security, and state and local law enforcement agencies – intrude upon the private communications of innocent citizens, amass vast databases of

²⁶ “Municipal Broadband Networks Present Serious First Amendment Problems.” p. 2.

²⁷ “Municipal Broadband Networks Present Serious First Amendment Problems,” p. 3.

²⁸ *Restoring Internet Freedom Order*, WC Docket No. 17-108, (December 14, 2017), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-166A1.pdf.

²⁹ Federal Communications Commission, “Protecting and Promoting the Open Internet Notice of Proposed Rulemaking,” WC Docket No. 17-108; FCC 17-60 at ¶17, adopted May 18, 2017, available at <https://www.fcc.gov/document/restoring-internet-freedom-notice-proposed-rulemaking>.

³⁰ Randolph J. May and Michael J. Horney, “What the Facebook Controversy Teaches about Privacy Regulation,” FSF Blog (April 4, 2018), available at: <http://freestatefoundation.blogspot.com/2018/04/what-facebook-controversy-teaches-about.html>.

who we call and when, and catalog “suspicious activities” based on the vaguest standards.

The government’s collection of this sensitive information is itself an invasion of privacy. But its use of this data is also rife with abuse. Innocuous data is fed into bloated watchlists, with severe consequences – innocent individuals have found themselves unable to board planes, barred from certain types of jobs, shut out of their bank accounts, and repeatedly questioned by authorities. Once information is in the government’s hands, it can be shared widely and retained for years, and the rules about access and use can be changed entirely in secret without the public ever knowing.³¹

Yet in “The Public Internet Option,” the ACLU largely abandons its critical assessment of local governments that run municipal broadband networks. The ACLU report makes no attempt to show that municipal providers have in practice protected privacy better than private municipal broadband providers. It instead largely asserts its conclusion that private broadband providers will aggressively infringe on users’ privacy.

In a 2014 law journal article entitled “Government-Provided Internet Access: Terms of Service as Speech Rules,” Professor Armijo pointed out that the presumption that government-run broadband networks will do a better job of protecting privacy than private providers is strongly contradicted by government agencies’ track record:

[T]he Internet has boosted the power and efficiency of the government’s mass surveillance apparatus such that any presumptions concerning the privacy of online speech have been overwhelmed by the State’s technological ability to monitor, amass, and crunch personal data. Based on what we now know of the surveillance state, the question of whether the government can collect information shared online is moot; the debate has already turned to setting the proper limits on its use of that information. In light of these sobering developments, one could easily conclude that the last thing we should be doing is enabling or encouraging governments to provide online networks for us to use for speech. We have seen what the State has shown itself capable of and willing to do in the surveillance context over private communications networks. Based on that experience, it would be naïve at best to think it would not bring those same attitudes to bear on monitoring and censoring speech over its own networks, where its efforts would be far more efficacious (internal citations omitted).³²

A 2008 law review article explains how private information in the possession of government-run broadband systems could be misused:

While municipal broadband applications have the potential for many beneficial uses, they also raise significant privacy and anonymity concerns. As video camera and

³¹ American Civil Liberties Union, “Privacy and Surveillance” (visited March 30, 2018), available at: <https://www.aclu.org/issues/national-security/privacy-and-surveillance>.

³² Enrique Armijo, “Government-Provided Internet Access: Terms of Service as Speech Rules,” *Fordham Urban Law Journal*, vol. 41, pp. 1499-1525, at 1524 (2014), available at: <https://ir.lawnet.fordham.edu/ulj/vol41/iss5/1>.

wireless sensor networks evolve and there is increasing ability to combine information from various sources—perhaps automatically triggered by an interaction with an embedded wireless sensor device—one can imagine that a number of potentially chilling scenarios can arise. What if, for example, a camera system uses a facial recognition system to identify a person or group of persons milling about a train station or participating in a protest march, and automatically correlates that identification with data about his or her known associations? Or perhaps a wireless sensor system could detect an RFID chip in a driver’s license as one approaches an advertising billboard, instantly referencing a database containing that person’s electronic profile, including age, gender, income, and buying habits; the advertising billboard then addresses the person by name with a tailored advertising pitch. Many people might find such access to and use of personal information invasive, yet the value of such a system to an advertiser would be enormous and, in an era of cash-strapped public transportation and highway systems, it could be tempting for a government to cooperate in its deployment.³³

The ACLU report also includes a brief and misleading account of the recent history of privacy protection online. Such privacy protection was the responsibility of the Federal Trade Commission before the 2015 *Open Internet Order* which divested the FTC of authority over ISPs when the FCC imposed public utility-style regulation on them. The *Restoring Internet Freedom Order* returned that responsibility to the FTC.

The ACLU report’s misleading account of this history completely fails to acknowledge the role of the FTC in protecting online privacy, and instead ratchets up the rhetoric by describing the transfer of privacy regulatory authority from the FCC as having “left an enormous gap in the protection of Americans’ privacy. The reversal of those rules represented a betrayal of legally clear, culturally deep, and historically longstanding protection for privacy in our essential communications infrastructure.”³⁴ This characterization is highly misleading for several reasons. For example, the FCC’s role in online privacy protection can hardly be considered “legally clear, culturally deep, and historically longstanding” considering it didn’t begin until 2015 and its main order, the 2016 *Broadband Privacy Order*, never took effect.³⁵

More fundamentally, there is no such “enormous gap” in broadband privacy protections because the FTC has returned to its historical role, which it held until 2015, of being the lead federal agency for protecting online privacy. Thus, federal protections for online privacy were not abandoned when the FCC adopted the *Restoring Internet Freedom Order*. The FTC has many institutional advantages over the FCC, based on its long-held position as the leading privacy protection agency in the world. I discussed the reasons why the FTC is better able to

³³ E. Casey Lide, “Balancing the Benefits and Privacy Concerns of Municipal Broadband Applications,” *New York University Journal of Legislation and Public Policy* (2008), Vol. 11, pp. 467-493, at 477, available at: <http://www.nyuilpp.org/wp-content/uploads/2012/10/Lide-Balancing-the-Benefits-and-Privacy-Concerns-of-Municipal-Broadband-Applications.pdf>.

³⁴ “The Public Internet Option,” p. 15.

³⁵ Federal Communications Commission, “Protecting the Privacy of Customers of Broadband and Other Telecommunications Services,” WC Docket No. 16-106 (October 27, 2016), available at: https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-148A1.pdf.

protect consumers and their privacy in my Free State Foundation *Perspectives* entitled “The FTC Has the Authority, Expertise, and Capability to Protect Broadband Consumers.”³⁶

As Professor Armijo has documented, there is no reason to be confident that municipal broadband systems will do a better job than privately-owned systems in protecting the privacy rights of their users. Indeed, there is reason to fear that government-run systems raise special concerns about privacy that are not present with privately run systems. As Professor Armijo concludes:

We should thus be wary of mayors arguing that what is good for Comcast or Verizon is no good for them. The fact that they proclaim, however loudly, that they favor net neutrality, including the restrictions on blocking and other practices contained in the FCC’s 2015 Order, while employing terms of service for their own government networks that are wholly inconsistent with those restrictions, ought to give one pause.³⁷

One will find no such pause in the ACLU report, which appears to be in stark contrast to the ACLU’s long history of professing skepticism about claims by government agencies that they can be trusted to protect the free speech and privacy rights of Americans. The ACLU report’s conclusion that government-run broadband systems have an advantage over privately run systems when it comes to protecting privacy is based on nothing more than its reliance on commitments the ACLU hopes municipal systems will adopt.³⁸ But actual municipal broadband providers in practice have often fallen far short of the standards the ACLU report assumes they will follow, and there is good reason to believe they will fall short in the future.

Conclusion

“The Public Internet Option” concludes by saying “communities that don’t offer internet services should consider doing so as a way of advancing those values [of making Internet service accessible and affordable while protecting free speech and privacy rights].”³⁹ However, the ACLU report fails to show that municipal broadband systems promote those values better than private broadband providers. Moreover, there is substantial evidence that private providers are promoting the very values identified in the ACLU report better than municipal providers.

On one hand, “The Public Internet Option” complains that many markets have too few broadband providers, giving private providers too much market power, while showing a

³⁶ Theodore R. Bolema, “The FTC Has the Authority, Expertise, and Capability to Protect Broadband Consumers,” *Perspectives from FSF Scholars*, Vol. 12, No. 35 (October 19, 2017), available at: http://www.freestatefoundation.org/images/The_FTC_Has_the_Authority,_Expertise,_and_Capability_to_Protect_Broadband_Consumers_101917.pdf.

³⁷ Enrique Armijo, “A Case of Hypocrisy: Government Network Censors Support Net Neutrality for Private ISPs,” *Perspectives from FSF Scholars* Vol. 13, No. 1 (January 3, 2018), p. 6, available at: http://www.freestatefoundation.org/images/A_Case_of_Hypocrisy_-_Government_Network_Censors_Support_Net_Neutrality_for_Private_ISPs_010318.pdf.

³⁸ “The Public Internet Option,” pp. 14-17.

³⁹ “The Public Internet Option,” p. 18.

surprising lack of interest in the question of why these markets don't have more private providers or what local governments could do to encourage more private competition. On the other hand, the ACLU report claims that the solution is to rely on local governments to provide broadband to their residents. But this ignores the role played by local governments in creating disincentives for private firms to build networks in their jurisdictions. In other words, the very solution the ACLU is proposing will create even more disincentive for private investment.

As for free speech rights and privacy, the ACLU shows a surprising willingness to suspend its usual skeptical concern about governments handling large volumes of sensitive customer data, and instead settle for promises from local governments that they will follow the net neutrality policies favored by the ACLU. As Professor Armijo notes, the fact that local governments loudly proclaim that they favor net neutrality policies supported by the ACLU, while employing terms of service for their own government networks that are wholly inconsistent with those restrictions, ought to give one pause.

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