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Municipal Broadband Networks Present Serious First Amendment Problems

by

Enrique Armijo *

This week the Federal Communications Commission is likely to vote 3-2 along party lines to preempt state laws in Tennessee and North Carolina that it finds interfere with municipalities' efforts in those states to provide broadband service. This action follows on the heels of President Obama's call last month for the Commission to take similar action in more than a dozen other states, and legislation introduced in the U.S. Senate proposing to preempt such laws nationwide. Concurrent with this activity are hundreds of other municipal initiatives to develop high-speed Internet connectivity covering service areas smaller than the city-wide level, such as then-Mayor Michael Bloomberg of New York City's announcement of the largest continuous free outdoor public WiFi network in the United States. That network, covering most of the Harlem neighborhood, will extend 100 city blocks and reach nearly 80,000 residents, including 13,000 public housing occupants, as well as businesses in and visitors to the area. And advocates of "fiber-to-the-home" for all Americans have called for additional public investment of nearly one hundred billion dollars in federal funding, much of which would go to city government-owned and operated broadband networks. In short, municipal broadband – here, referring to any government-owned broadband network covering a city-sized service area or smaller and open to the public's use, either free or for a fee – is at the center of the conversation over our communications future.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

Questions arising in this ongoing debate include whether these networks are a proper use of public funds; whether competition between public and private providers of broadband is actually a fair fight; whether the FCC has the legal authority to preempt state laws in this area; and whether such an act by a federal agency affords proper respect for longstanding principles of federalism and home rule. These are all important issues. But in the rush to embrace this new future, however, policymakers, advocates, and even the members of the public for whose benefit municipal broadband networks are intended have lost sight of a more fundamental question. At their core, these networks, which will carry emails and texts, and host websites, applications, and other user-generated content, are government-provided speech spaces – publicly owned property over which citizen expression travels. Though several constitutional questions would seem to logically follow from that premise, we are reluctant thus far to ask them. In the rush to embrace dynamic communications technologies, we run the risk of accepting these state-provided digital speech spaces as part of our infrastructure of expression without thinking through the relevant First Amendment questions. Unfortunately, there is good reason so far to conclude that the historical constitutional protections for free speech from government interference that we have long enjoyed are being sacrificed at the altar of the new. This alone should give pause to those advocating for municipal broadband networks, and it certainly should give pause to those that want the FCC to preempt state restrictions on these networks and expand municipalities’ power in the online communications space.

The networks of the two municipalities that brought the preemption actions to the FCC referred to above demonstrate the scope of this problem. One of those municipalities, Chattanooga, Tennessee, has received national attention for its fiber optic network, which is run by the city’s power utility board. Chairman Tom Wheeler has pointed to Chattanooga, or “Gig City,” as it’s becoming known, as a model for other cities’ efforts. Here, however, is what users of Chattanooga’s network must agree to as a condition of service, as set out in the 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.

Similarly, Project Greenlight, the community broadband network in Wilson, North Carolina, the other municipality seeking preemption-based relief from the FCC, states that subscribers may not use the municipality’s network to “send, post, or host harassing, abusive, libelous or obscene materials or assisting in any similar activities related thereto,” and users may not “engage in any activities or actions intended to withhold or cloak any user’s identity or contact information.” Greenlight, like the utility company in Chattanooga, also reserves the right to disconnect users or remove content that, in the service provider’s sole discretion, violates these terms.

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. And the ban on anonymous speech in Project Greenlight’s Terms of Service directly conflicts the U.S. Supreme Court’s consistently declared protections for such speech.

Accordingly, it is clear that terms of service containing content-based proscriptions of the type used by Chattanooga, Wilson, and perhaps scores of other municipalities are impermissibly restricting carriage of a willing user’s right to transmit protected speech over the municipalities’ networks. And the operators of these public networks charged with enforcing these terms – the utility board employee who will be in the position to make assessments as to whether speech should be transmitted – will likely err on the side of suppressing speech, whether due to lack of legal training or general risk aversion. Where the question is close, speech almost always loses. And most troubling is the fact that since such speech suppression takes place behind our screens, this type of interference will be much harder to detect than the closing of a park, the denial of a parade permit, or an arrest in the public square.

The waivers from suit as a condition of service in both the Chattanooga and Wilson terms of use present a similar problem. Government’s conditioning the receipt of a benefit such as broadband access on accepting a prior restraint on speech offends the unconstitutional conditions doctrine. In its simplest form, the doctrine states that government may not coerce people into relinquishing constitutional rights through its regulation, spending, and licensing power. In the case of these municipal broadband terms of use, the government’s demanded relinquishment is of the First Amendment-derived right to nondiscriminatory treatment of speech, and the coercion is the pre-requirement of waiver of the right to sue in exchange for access to the network over which that speech will take place. Moreover, governments conditioning Internet connectivity on their users’ waiver of their First Amendment rights cannot be heard to argue that prospective speakers can simply exercise those rights using the networks of private ISPs. The unconstitutional conditions doctrine is unconcerned with “alternative settings” for the speech of the parties the government seeks to coerce. In other words, the existence and availability of an alternative for carriage of the speech in question in the form of a *privately* owned network can’t cure the constitutional harm caused by the government’s demand that a user waive a right in return for the benefit of *public* network access. A “you can say it over Comcast’s network” defense by Chattanooga or Wilson would thus be unavailing, in much the same way as the Postal Service can’t refuse to deliver a letter because of its content on the ground the letter’s sender could have used FedEx instead.

If we decide, as the FCC seems to have decided, that empowering local governments to provide direct broadband services is in the public good, then how can we solve this problem? In short, any terms of use utilized by a municipality for governing access to its network, and in particular the network operator’s ability to bar uses and users, must be limited. Any waiver from suit in a municipal broadband network’s terms of use must be circumscribed to those content-neutral, technically-based disconnections associated solely with network management and maintenance.

And if a municipality does choose to limit certain content-based uses on its network, then those limitations must be restricted to the few categories of unprotected speech that the government may circumscribe because of its content, such as incitement, obscenity, false advertising, and copyright infringement.

This *Perspectives* has argued that hundreds, if not thousands, of users on municipal broadband networks have had and will have their First Amendment rights violated by municipalities placing content-based restrictions on the use of those networks, and by conditioning user's connectivity on the acceptance of those restrictions. In light of these developments, one might 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. Thanks to Edward Snowden and others, we have seen what the government 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 that government 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. In order to protect speech to the greatest degree possible, the most speech-protective position might be for the government to stay out of the speech carriage business altogether.

But I doubt they will. Many governments – not just the usual despots in the Middle East and Africa, but enlightened democracies such as Great Britain and Australia – have been unable to resist the temptation to censor speech by exercising control over information communications technology. It is thus dangerous to assume that more digital speech will lead to a fuller marketplace of ideas, greater self-fulfillment, and more informed political choices. However, it also is difficult, as well as overly pessimistic, to conclude that technological change, even government-spurred change, necessarily comes at the expense of free speech.

The First Amendment is not self-enforcing. Well-crafted network management principles can help ensure that speech carried via government-provided communications technology is adequately protected, so long as those principles are (i) informed by traditional First Amendment rules on content neutrality and prior restraint, but also (ii) mindful of both technology's particular capacity to repress expression *ex ante* and the government's innate impulse to monitor, censor, or otherwise control the dissemination of ideas. Critically, however, those rules should be in place before the wires are laid and antennas are raised. Assuming for purposes of this *Perspectives* that some municipal governments are going to be in the business of running communications networks, if we design and implement communications networks with freedom of speech in mind, we can be more confident that these new digital speech spaces actually might be the enablers of expression, galvanization, interactivity, and change, rather than the opposite.

* Enrique Armijo, a member of the Free State Foundation's Board of Academic Advisors, is an Assistant Professor at the Elon University School of Law and an Affiliated Fellow of the Yale Law School Information Society Project.