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Municipal Broadband Networks in Court: Why Is the FCC Ignoring First Amendment Violations?

by

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Last month, Tennessee and North Carolina filed briefs in the U.S. Court of Appeals for the Sixth Circuit challenging the FCC's preemption of laws in those states that restricted municipalities' efforts to provide their own broadband service. The briefs challenge the Commission's action on sovereignty, statutory, and constitutional grounds. However, no mention was made in any of these briefs, or the briefs filed by interested parties, concerning the novel and important First Amendment-related issues raised by government-provided Internet service – in particular the restrictions governments routinely place on the use of those services that can infringe on their subscribers' rights to free speech.

If the parties in the municipal broadband litigation are ignoring the First Amendment, perhaps they have a justifiable reason: the FCC did so as well. We shouldn't let the agency off so easy.

In comments that mirrored an argument I made in a Perspectives from FSF Scholars published by the Free State Foundation just before the FCC adopted its preemption order, I told the Commission (and pardon me for self-quoting here) 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." More specifically, the very municipalities that were asking the Commission

to preempt state laws preventing the expansion of their networks to other areas were engaged in unconstitutional *prima facie* content-based restrictions of their users' speech. Yet the FCC turns a blind eye to these First Amendment violations.

For example, the "Acceptable Use Policy" of the Chattanooga Electric Power Board's municipal broadband network bars use of the network to "transmit, distribute, or store material . . . that is," in addition to illegal, "threatening, abusive or hateful." Nor may users of the Chattanooga 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. Similarly, Project Greenlight, the community broadband network in Wilson, North Carolina, the other municipality to which the Commission granted preemption-based relief, bars subscribers from using the city's broadband network to "send, post, or host harassing [or] abusive … materials or assisting in any similar activities related thereto." Nor may users "engage in any activities or actions intended to withhold or cloak any user's identity or contact information." Greenlight, like the Board in Chattanooga, also reserves the right to disconnect users or remove content that, in its sole discretion, violates these terms.

The terms of these "acceptable user policies" are black-letter prior restraints on free speech. If I send a message across a municipal broadband network that – again, in the sole discretion of the government's network operator – violates one of these overbroad, content-based terms, my message will not be transmitted and my service will be terminated. I have no notice of the restraint on my speech, nor grounds or procedure for appeal of the decision. Indeed, since all of the decision-making and corrective action takes place behind my computer screen, I may not know my speech has been restrained or that I have been disconnected at all. This 21st-century speech suppression will be much harder to detect than the closing of a park to a parade, or the arrest of a speaker in a public square. If these municipal broadband networks are part of the new public forum, and the actions of Chattanooga and Wilson are permissible, then the First Amendment is well and truly in trouble.

So what did the FCC do when these violations were brought to its attention? It punted. Buried deep within its Report and Order, at page 70 (and I wish I were joking here), footnote 455, the Commission stated that even if it was so that "the terms of service of some municipal providers infringe on subscribers' constitutionally protected speech rights," the agency maintained it was not, to use my term, "'ratifying' such infringement by preempting restrictions on municipal broadband, because we take no position here on the terms of service that municipal provider may or should offer."

Well. At the risk of overvaluing one's own arguments, it certainly seems that an agency of government with actual knowledge of an ongoing constitutional violation by a party seeking relief from it should do more than "take no position" on those violations. If I happened to reside in a minority neighborhood, and the Waste Department left me a note stating it wasn't picking up my and my neighbors' trash because we were Hispanic, I certainly hope that the city of Greensboro where I live would do more than "take no position" if I informed the Department that its conduct violated the Fourteenth Amendment. And I would doubly hope the city wouldn't ignore the constitutional violation when deciding whether to expand the Department's

collections service to other neighborhoods – which is exactly what the Commission did when it granted Chattanooga's and Wilson's requests to preempt state law.

To the extent it was just too much work for the agency to actually decide whether the municipalities' "acceptable use" terms violated the First Amendment, we know that the problem with the FCC is not a paucity of lawyers to make constitutional arguments on its behalf. The relevant principle of administrative law here is simple: if a commenter tells an agency that its action implicates the Constitution, the agency must either (i) resolve the constitutional problem the commenter raises, or (ii) provide a substantive response as to why it need not. "We take no position" is not good enough.

Furthermore, and despite its pro-forma dismissive protestations, it would have been exceedingly simple for the Commission to have taken into account "subscribers' constitutionally protected speech rights" when acting. The agency easily could have conditioned granting a municipality preemption of a restrictive state law on that municipality's assurance that it would not block or refuse to carry content over its broadband network for content-based reasons. Follow the First Amendment, the preemption rule could state, or else you remain subject to the state law of which you complain. If the FCC's interpretation of its statutory authority is correct, then the greater power to preempt the North Carolina and Tennessee laws at issue outright would certainly include the lesser power to condition preemption on lawful conduct by the municipalities asking the agency for relief. And such a rule would establish a presumption in favor of the First Amendment—a presumption that it is as much an agency's obligation as a court's to enforce.

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If we know anything about this FCC, it is that it is not at all shy about commanding broadband Internet service providers not to discriminate when carrying user traffic. It is odd that the agency would be so aggressive in the face of nearly nonexistent evidence of discrimination by private ISPs, yet so timid in the face of clear and ongoing discrimination by municipalities that amounts to a First Amendment violation. From its multiple ownership rules to the Open Internet proceedings – from old media to new, and for several decades' worth of agency actions – the Commission consistently has declared that the First Amendment is a critical component of the information policy of the United States, and that it has a primary role to play in promoting and enforcing that policy. If that is so, then part of that role cannot be to exercise agency authority in a way that drastically expands the capacity of local governments to violate individuals' rights to free speech.

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