Bloomberg BNA

Daily Report for Executives™

Communications

Municipal Broadband

When the FCC adopts broad net-neutrality rules applying ''public utility treatment'' to local broadband networks later this month, it will need a yard stick to distinguish Internet service operators' legitimate network management requirements from anti-competitive efforts to disadvantage others, author Nicholas P. Miller of Best Best & Krieger LLP writes. Nonprofit municipally owned broadband networks may be the ideal tool.

So, the FCC needs to preempt existing laws in many states that block muni-broadband. But federal preemption of state laws is always legally difficult; critics say it is impossible with muni-broadband. Miller suggests how the FCC could pull off the operation.

FCC Should Use Scalpel, Not Ax to Preempt State Laws Limiting Muni-Broadband

By Nicholas P. Miller

On Feb. 26, the FCC plans to act to preempt state laws that retard development of municipally owned broadband networks. The breadth of the potential preemption is unclear. The decision will occur at the same meeting at which the FCC plans to adopt broad net neutrality rules applying ''public utility treatment'' to local broadband networks to protect consumers and broadband applications.[1]

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How did municipal ownership of broadband networks rise to equal billing with net neutral ''just and reasonable treatment'' of internet content? Local ownership of broadband distribution networks has risen steadily in the federal policy debate over broadband deployment. Accelerated by the Obama stimulus legislation of 2009, non-traditional ownership of broadband networks has proliferated.

New Purpose for Muni-Broadband

Now the FCC may hope to use non-profit networks as ''yardsticks'' to observe developments in the local broadband distribution market as ''net neutrality'' rules are rolled out. The FCC is likely to impose hortatory net neutrality ''behavior standards'' and ''transparency requirements'' rather than specific performance and price

[1] Press Release, Federal Communications Commission, FCC Announces Tentative Agenda for February Open Meeting (Feb. 5, 2015) (available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-331900A1.pdf).

 ISSN 0148-8155

requirements for broadband network providers.[2] The FCC needs a yard stick to segregate real from false claims about the on-going needs of broadband network providers: when are operator requirements legitimate network management and when are they anti-competitive efforts to disadvantage others?

Publicly owned networks offer the necessary yardstick to compare terms of service, prices, and operational requirements. So, the FCC wants locally owned network providers to succeed and grow in the marketplace and needs to preempt existing laws in many states which prohibit directly and indirectly such networks.

On the other hand, federal preemption of state laws is always legally difficult. In our federal system, federal authorities are not presumed to have the right to tell states what to do, or to preclude sovereign states pursuing their own policies. As the FCC moves toward curbing the worst anti-competitive broadband abuses in state law, it must tread lightly—and point repeatedly to national policy authorized by federal law as the basis for any preemption.

The Case for Local Government Broadband Networks

Municipally owned broadband networks have developed to address public needs and interests the private sector broadband providers have ignored. Sometimes driven by refusal to serve, sometimes by inadequate service quality or outrageous prices, sometimes by unique governmental needs not addressed by commercial offerings, local governments have developed a mosaic quilt of self-provided broadband networks and related services.[3] Since the earliest days of telephony, municipal and co-operative telephone operators have successfully built and served rural, low-density, and high-cost areas that the investor owned companies bypassed.[4] Often co-located with public power entities, this movement continued into the broadband era, first with municipally owned cable television systems and more recently with broadband fiber optic data distribution networks.[5] This movement accelerated first with ultra-broadband service to Universities and research institutions and then with the American Recovery and Reinvestment Act of 2009 (''ARRA'') which provided several billions of federal dollars to fund ''anchor institution'' broadband networks.[6] Today, there is a wide range of local and state government-owned broadband networks, offering a wide range of data services. While telephone and cable operator opposition has focused on consumer retail services, these publicly owned systems are best characterized as a much more eclectic collection of networks that were built to address multiple community needs the private companies would not serve at reasonable prices.

Today, there are hundreds of local government fiber and data networks in operation. Some are special purpose internal communications networks providing e-government interfaces with citizens , traffic control and public safety communications. Some are high-tech billing, monitoring and management systems operating in conjunction with regional transportation, power, water and wastewater systems. Some are broadband educational and health networks connecting laboratories, libraries, classrooms, campuses, hospitals and neighborhood clinics. Some are traditional cable television video systems offering retail cable services to consumers and wholesale data transport services to local businesses. And some offer retail level telephone, cable video and internet access by local public power entities, like Cedar Falls Utilities and Chattanooga Public Power. These networks grew from fiber systems built to better manage retail and wholesale power consumption when the local community realized the networks were capable of addressing multiple other community needs as well.[7]

Industry Opposition Has Been Brutal

Over the last two decades, the telephone and cable television industries have not been asleep to the competitive threat posed by municipal level broadband initiatives. They have pursued an aggressive 3-part strategy reminiscent of the old public versus private power debates of the 1930's-40's. First the cable operators took on local governments which had the temerity to propose some form of local ownership, investment, or operation. Every community considering local involvement in broadband faced a voter initiative, lawsuits challenging the community's authority, a major PR campaign challenging government involvement in a private business.[8] Second, the telephone/cable lobbyists made common cause at state legislatures seeking a range of prohibitive restrictions on local involvement in broadband.[9] Led by the American Legislative Exchange Council (ALEC), right-wing legislators in different states introduced similarly worded proposals to prohibit using local bond authority, require extensive premarket surveys, grant incumbent operators rights of first refusal, prohibit any use of taxpayer funds or public employees for the proposed operations, and restrict the lines of business and geographic areas to be served by any municipally owned networks.[10] Third, the in-

[2] Fact Sheet: Chairman Wheeler Proposes New Rules for Protecting the Open Internet (Feb. 4, 2015) (available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-331869A1.pdf).

[3] http://www.muninetworks.org/communitymap.

[4] http://www.ntca.org/about-ntca/history-of-rural-telecommunications.html.

[5] The American Public Power Association claimed 108 members provided internet access service in 2010. See http://www.ntia.doc.gov/legacy/ntiahome/broadband/comments2/APPA.htm at note 11.

[6] 47 USC § 1305(g)(3).

[7] See for example, discussion of Chattanooga EPB decision to build area-wide fiber network based on electric distribution network needs alone, http://www.ilsr.org/wp-content/uploads/2012/04/muni-bb-speed-light.pdf at 35.

[8] The history of Lafayette, La., is instructive. Multiple lawsuits, appeals and then more lawsuits. http://arstechnica.com/tech-policy/2010/05/lousiana-fiber-network-running-despite-cable-telco-lawsuits.

[9] The behavior state by state in the 19 legislatures that have adopted legislation to discourage local government deployment of broadband networks is surprisingly similar. Here is a good description of the playbook: http://www.publicintegrity.org/2014/08/28/15404/how-big-telecom-smothers-city-run-broadband

[10] http://www.alec.org/task-forces/telecommunications-and-information-technology/municipal-broadband.

In 19 state legislatures, outrageously restrictive laws were passed and are still on the books. A good example is the State of North Carolina, NCGA § 160A-340, *et seq*. The City of Wil-

  DER ISSN 0148-8155

cumbents brought their arguments to the FCC and tried to restrict local government cable franchise authority to require Institutional networks and other dedicated facilities to address local community non-commercial video and data needs.[11]

Fortunately, the ARRA had the unintended consequences of stopping further state legislative action. This apparently happened because the ARRA required all networks it funded to offer open access and nondiscriminatory carriage to over providers.[12] As states sought this federal grant money, they realized further anti-competitive laws would disqualify their federal grant applications. But the earlier ugly laws still exist in places like North Carolina and Tennessee. And any community interested in building its own facilities has learned the painful lesson of those that have gone before—be prepared for scorched-earth tactics by the telephone and cable television operators.

Chairman Wheeler recognized this reality in a blog post in June 2014, shortly after visiting Chattanooga:

> ''Ironically, Chattanooga is both the poster child for the benefits of community broadband networks, and also a prime example of the efforts to restrict them.
>
> Tennessee is one of many states that have placed limits on the deployment of community networks. Tennessee's law is restricting Chattanooga from expanding its network's footprint, inhibiting further growth. . . . Commercial broadband providers can pick and choose who to serve based on whether there is an economic case for it. . . . If the people, acting through their elected local governments, want to pursue competitive community broadband, they shouldn't be stopped by state laws promoted by cable and telephone companies that don't want that competition.
>
> I believe that it is in the best interests of consumers and competition that the FCC exercises its power to preempt state laws that ban or restrict competition from community broadband. Given the opportunity, we will do so.[13]

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FCC Preemption Requires Careful Legal Thought

Chairman Wheeler's proposal to deal with anti-competitive state laws was well received in communities burdened with ALEC-like statutes. Communities like Wilson, N.C., and Chattanooga, Tenn., know their existing municipally owned networks could do more, better, cheaper than the incumbents if not restricted by state statutes restricting the areas they serve. Elsewhere in local government, there was less enthusiasm for the Chairman's comments favoring preemption. Every local government has a cable franchise and has zoning rules controlling wireless tower siting. Not every local community has a municipally owned broadband network.

So there is consensus among local elected officials that the FCC has been misguided in much of its recent preemption of local franchise authority over cable television operators[14] and local zoning authority over tower siting.[15] In both cases, the FCC's rationale for preemption of local rules sounded fearfully like the rhetoric the FCC Chair used in criticizing the state laws affecting local ownership: in an area traditionally and exclusively subject to state and local law, FCC claimed broad preemptive authority to impose a national priority, regardless of the local community's specific facts. The FCC has protected the interests of wireless carriers in forcing one-size-fits-all zoning rules that trump property interests of local residents. And the FCC has issued a series of orders limiting and shrinking local government's authority to require in-kind broadband facilities from cable television operators through the cable franchise process.[16]

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son Petition for Relief contains a detailed analysis of the NC legislation. *In the matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statutes § 160A-340, et seq*., WC Docket No. 14-115 (filed July 24, 2014), at:

http://apps.fcc.gov/ecfs/document/view?id=7521737310 (1-24),

http://apps.fcc.gov/ecfs/document/view?id=7521737311 (25-49),

http://apps.fcc.gov/ecfs/document/view?id=7521737312 (50-59).

The North Carolina law allows only ''unserved areas'' of the state to be served by municipal systems, and adopts a definition of ''unserved'' that includes only the very lowest density, remote regions. In addition, the law requires: 1) a public entity must comply with requirements applicable to a private entity (which by definition a public entity can't satisfy); 2) separate enterprise funds for each communications service provided and prohibits any cross funding of services; 3) service be limited to the corporate limits of the community; 4) phantom costs ''equal to whatever a private provider would incur'' be imputed into consumer price; and 5) a special election.

[11] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Second Report and Order, 22 FCC Rcd 19633 (2007) (''Second Report and Order'').

[12] 47 USC § 1305(j).

[13] http://www.fcc.gov/blog/removing-barriers-competitive-community-broadband

[14] Second Report and Order, *supra*; Petitions of NATOA et al. Petition for Reconsideration and Clarification (filed Dec. 21, 2007); City of Breckenridge Hills, Missouri Petition for Reconsideration (filed Dec. 21, 2007); City of Albuquerque, New Mexico et al. Petition for Reconsideration (filed Dec. 21, 2007).

[15] Report and Order of the Federal Communications Commission, *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, FCC 14-153, WT Docket No. 13-238 (Oct. 17, 2014).

[16] The FCC has been bipartisan in its adverse treatment of local government authority over the last 15 years. Three major issue areas intersect local government and FCC interests. One is local cable television franchise authority which is spelled out and protected by Title VI of the Federal Communications Act, 47 U.S.C. § 521, *et seq*. The FCC has handed down a series of restrictions on traditional local authority. The decisions restrain local authority to require specific facilities, performance and customer service standards, as well as funding to support public, educational and governmental programming by cable television operators.

The second is local zoning authority over the siting of wireless towers and antennas, 47 U.S.C.§ 332(c)(7). Congress explicitly protected local zoning decisions and the FCC has narrowed the language repeatedly.

Only in the third area, public safety communications, has the FCC been largely supportive of state and local government requests for spectrum and operational discretion. Because all three of those areas have dealt with explicit federal statutory

In response to Chairman Wheeler's blog last June, the City of Wilson, N.C., and the Chattanooga Electric Power Board filed petitions for special relief with the Commission. CEPB asked the FCC to preempt the Tennessee statutory limit on CEPB's geographical area of broadband service.[17] Wilson asked the FCC to preempt generally the multiple provisions of a North Carolina statute which make it practically impossible for Wilson to extend its fiber network to surrounding communities.[18]

Most fair-minded observers will conclude that the North Carolina and Tennessee laws were written by industry proponents specifically to restrict and prohibit expansion of municipally provided broadband services. Will the FCC act to preempt some or all of these provisions? At this point, municipal enthusiasm for relief must be tempered by the reality that the FCC has not traditionally been the partner, let alone the friend of local governments. In other words, be careful what you ask for—when federal authorities begin preempting state and local laws and policies, the process requires a scalpel, not a meat cleaver.

While relief from state legislative efforts to defeat competition to the incumbent operators is welcome, any action by the FCC must be consistent with the nation's system of federalism, and consistent with the Supreme Court's precedents limiting the authority of the federal government over the states.

Fundamental federalism law is that the Tenth Amendment reserves all governmental powers to the states that the U.S. Constitution does not give to the federal government. In the area of regulation, the courts traditionally require the federal authority have explicit statutory authority to carry out a federal policy (in this case the Communications Act of 1934), permitted by a Constitutional provision (in this case the Interstate Commerce Clause), to preempt ONLY state regulatory actions that frustrate the federal policy.[19]

The FCC cannot order the state to become an agent of the federal government carrying out federal policy.

The FCC can preempt contrary state regulation, but cannot order the state to become an agent of the federal government carrying out the federal policy.[20] And the FCC cannot preempt a state proprietary (as opposed to regulatory) action which is taken pursuant to the state's property interests (what are protected under the 5th Amendment, just as private property rights are protected). The *Printz opinion* suggests the solution—if the federal government wishes to authorize the placement of facilities, it must do so itself—and take responsibility for those actions.[21] On the other hand, the federal government can preempt state regulations .[22]

Within this broad analysis, there is a particular problem when the FCC deals with local governments.

47 U.S.C § 253(a) of the Communications Act bans any state or municipality from prohibiting ''any entity'' from offering telecommunications service. This would seem to end the discussion—the FCC is about to find that providing broadband service is a ''telecommunications service''. Section 253(a) is an explicit statute within the authority of the FCC to enforce. But unfortunately for the FCC, and fortunately for local governments, the U.S. Supreme Court, in *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), found that local governments are not ''any entity'' within the meaning of 253(a). So 253(a) does not give the FCC the authority it needs to preempt the state laws.[23]

The likely response of the FCC will be to rely on 47 U.S.C. § 706, which mandates the FCC promote the rapid deployment of broadband services and remove barriers to that deployment. This is the authority the FCC originally relied on for its first set of net neutrality rules, which the courts struck down as not fitting within the meaning of the language § 706. Will the FCC meet the same problem if it preempts the TN/ NC statutes? Probably not, if the FCC is careful to define why its preemption is authorized by § 706(b) and is as narrowly drawn as possible to not intrude on appropriate state authority over local governments.

The FCC's New Alternative

The FCC has an alternative. It can rely on the new net neutrality rules under Title II, finding that the state stat-

language, federalism arguments by local governments have been largely unsuccessful.

[17] *Petition Pursuant to Section 706 of the Telecommunications Act of 1996 for Removal of State Barriers to Broadband Investment and Competition*, filed by Electric Power Board, Chattanooga, Tennessee, WC Docket No. 14-116 (filed July 24, 2014), at 3, available online at http://apps.fcc.gov/ecfs/document/view?id=7521737334.

[18] *In the matter of City of Wilson, North Carolina Petition for Preemption of North Carolina General Statutes § 160A-340, et seq*., WC Docket No. 14-115 (filed July 24, 2014), at 2-3.

[19] The federal government ''may not compel the States to enact or administer a federal regulatory program.'' (*Printz v. United States*, 521 U.S. 898, 918-19, 925026 & 933 (1997)(quoting *New York v. United States*, 505 U.S.144, 188 (1992)).

[20] The Constitution only authorizes the federal government to regulate individuals, not States. (*Printz*, 521 U.S. at 925).

[21] *Id.*

[22] *American Airlines v. Dept. of Transp.* 202 F.3d 788, 810 (5th Cir. 2000); *Building & Construction Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 219 (1993). However, the Communications Act does not preempt ''nonregulatory decisions of a state or locality acting in its proprietary capacity.'' (*Sprint Spectrum v. Mills*, 283 F.3d 404, 421 (2d Cir. 2002)).

[23] In *Nixon*, the Missouri Municipal League challenged a Missouri state law that prohibited local governments from offering telecommunications services. The League claimed the explicit language of 47 U.S.C.§ 253(a) banned any state law that prevented ''any entity'' from offering competitive telecommunications services. The Supreme Court held that ''any entity'' did not include local governments because Congressional intent to preempt state authority over local governments was not clear. Federalism principles required the strictest interpretation of the language when a state was dealing with the powers and authorities of its own creatures—local governments. The decision was met with mixed reaction in the local government community. As discussed later in this article, there was broad local government concern that the FCC would use 47 U.S.C. 253(a) to broadly preempt many local rules and agreements governing use of rights of way by telecommunications service providers. The *Nixon* result discouraged that trend.

  DER ISSN 0148-8155

utes cause unreasonable and unjust discrimination in the availability of broadband services. That would be both new and strongly supported by local governments.

The FCC needs to avoid using § 253(a). Any FCC attempt to revisit *Nixon* endangers an entire range of local government franchise, tax and fees traditions related to cable and telecommunications service providers. The industry would love that door opened to attack local government revenues. This is not a sanguine possibility. The FCC has now preempted local zoning authority over cell tower siting, imposing shot-clocks for local decision making, and implementing a new Congressional statute[24] apparently granting wireless companies unprecedented rights to federally mandated outcomes if local processes don't work to the tower companies' interests. And the FCC recently issued an order on reconsideration stating that cable operators may be able to reduce their franchise fee payments to local governments if the local franchise requires local broadband facilities dedicated to public use.[25]

Local Government Broadband Networks as the Yardstick for Net Neutrality

This author hopes the FCC thinks this problem through. The proposed FCC net neutrality rules are dependent on hortatory standards and expectations, but not many rules. The FCC is desperate to avoid rate regulation and terms and service tariffs for broadband providers. To get satisfactory results in the marketplace, the FCC needs real life examples of what is working, and why and where the problems are occurring. There is a real partnership possible between federal and local authorities. If local government cooperates in expanding local broadband network options, the FCC will have real tools to measure performance under the new net neutrality rules. Local networks can provide meaningful rate and operational information to judge the behavior of the incumbents and to observe nonprofit entities testing innovative prices, terms of service and investment strategies.

Last month, President Obama traveled to Cedar Falls, Iowa to promote the city's public utility, which is operating a fiber-based broadband network to all homes and businesses in the community.[26] ''What you're showing is that here in America, you don't have to be the biggest community to do really big things,'' Obama said. The President went on to urge the Federal Communications Commission to strike down state laws that limit local governments from building their own networks. ''In some states, it is virtually impossible to create a community network like the one that you've got here in Cedar Falls,'' he said. ''Enough is enough. We're going to change that so every community can do the smart things you guys are doing.''

Let's hope the FCC gets it right and a new era of federal-local partnership commences.

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[24] Middle Class Tax Relief and Job Creation Act Title VI (Spectrum Act) § 6409(a), 47 U.S.C. § 1455 (2012).

[25] *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration, FCC 15-3, (Jan. 21, 2015), available online at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-3A1.pdf.

[26] http://www.whitehouse.gov/the-press-office/2015/01/14/remarks-president-promoting-community-broadband.