Perspectives from FSF Scholars
July 31, 2014
Vol. 9, No. 27

The FCC Shouldn't Go Down the Primrose (Preemption) Path

by

Randolph J. May *

The Hill
July 31, 2014

The Federal Communications Commission (FCC) already has suffered two judicial rebukes in its efforts to impose net neutrality mandates on Internet service providers, most recently this past January in the D.C. Circuit's *Verizon v. FCC* decision. Nonetheless, the agency now is in the midst of yet another rulemaking proposing to adopt new net neutrality regulations.

But here I want to address a separate, but nevertheless related, FCC initiative that is likely to lead to yet another judicial reversal. In response to the Verizon defeat, FCC Chairman Tom Wheeler has said that he wants to encourage municipalities to operate their own broadband networks in competition with private-sector broadband providers.

Invoking a "pro-competition" mantra, Wheeler intimates government-run communications networks are no different than those run by private providers. So, he wants the FCC to consider preempting state laws banning or restricting the provision of communications services by municipalities. Harkening to Wheeler's siren song, on July 24 two cities – Chattanooga, Tenn., and Wilson, N.C. – filed petitions asking the commission to preempt

restrictions in their states. Acting with unusual dispatch, on July 28 the commission issued a notice seeking public comment on the petitions.

Wheeler's idea that the FCC should preempt the 20 state laws restricting municipal telecom networks is flawed from both a policy and legal perspective.

As for policy, there are good reasons why so many states have banned or restricted municipal networks. In general, cities that have ventured into the communications business have compiled a pretty dismal record of failure. In recent years, some of the most publicized failures include the government-run networks in Burlington, Vt.; Provo, Utah; Lafayette, La.; Mooresville and Davidson, N.C.; and Utah's inaptly named UTOPIA network consisting of 10 towns.

These networks and others have fallen short of meeting their initial rosy financial projections, leaving the municipalities' taxpayers and bondholders on the hook to make up the financial shortfall. At the same time, the private-sector providers, such as cable operators and telephone companies, find it difficult to compete against government entities that enjoy taxpayer-funded financial advantages, along with other competitive edges such as preferential permitting and rights-of-way privileges.

So, there is certainly a valid policy justification for the state laws restricting municipal networks.

Moreover, any attempt by the FCC to preempt the state bans is likely to fail as a matter of law. In *Nixon v. Missouri Municipal League* (2004), the Supreme Court agreed with the FCC's then-position that the Communications Act provision granting the agency authority to preempt state laws that "have the effect of prohibiting the ability of any entity to provide" communications services did not extend to government networks. In doing so, the court reiterated its longstanding principle that there must be a clear statement from Congress before the federal government acts in a way that constrains state authority.

Wheeler suggests that the Commission may preempt the state bans under now-famous Section 706 of the Communications Act that the D.C. Circuit interpreted as authorizing agency actions that promote broadband deployment. Whatever the extent of the FCC's authority under Section 706, it almost certainly doesn't extend to allowing the agency to interfere with a state's relationships with its municipalities. There is no clear statement in Section 706 that Congress intended to grant the FCC such preemptive authority.

In any proper conception of our federalist system, it is not enough for Wheeler simply to suggest that the wishes of municipalities should prevail over the state sovereigns under which they are created. After all, in our constitutional regime, we do not recognize, as a matter of legal status, "citizens" of Provo or Lafayette, but we do recognize citizens of Utah and Louisiana. And the Constitution confers upon these citizens of states the authority to exert their will through their elected representatives to adopt laws that restrict municipal activities. This is what the Supreme Court meant when it rejected preemption in its Missouri Municipal League decision, declaring that "preemption would come only by interposing

federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"

Rather than pursuing actions likely to result in further court defeats, the FCC could make better use of its time – while promoting more competition – by focusing on eliminating existing regulatory burdens that impede private-sector investment in new broadband networks.

* Randolph J. May is President of the Free State Foundation, an independent**,** nonpartisan free market-oriented think tank located in Rockville, Maryland.