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Don't Let Governments Own the Internet's Future

by

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The Internet is the 21st century's free speech and free market success story. Innovation in technology backed by entrepreneurial investment is the secret to that success. Yet President Obama is pushing the Federal Communications Commission on a warped course that will deter private investment in broadband Internet. Worse still, it's a course that will erode taxpayer protections and constitutional federalism.

In a Jan. 14 speech, President Obama urged the FCC follow through with a far-fetched plan to increase local government ownership of broadband Internet services. The plan involves a convoluted misuse of FCC preemption power. In essence, regulators in the federal government would bestow new powers on local governments to become owners of broadband networks.

About twenty states restrict their local governments from becoming broadband Internet businesses. Such restrictions prevent troublesome conflicts of interest. They avoid scenarios in which government is both a regulator of broadband businesses and a broadband business competitor.

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Private market competitors don't relish competing against government, which is under no pressure from the forces of supply or demand or the need to turn a profit. Favoritism toward government-owned broadband services over private services in bureaucratic permitting and licensing is a serious risk. Fear of disfavored treatment by government deters private market investment in Internet infrastructure.

States have a duty to protect taxpayers from abuse. When local governments own broadband networks, they often subsidize them with local tax dollars or with government bond issues. Politicians have hyped government-owned networks as inexpensive new sources of competition. In reality, many government-owned networks have failed to meet rosy speed or subscriber projections and turned into financial flops. Local taxpayers have been tapped to pay for those failures.

For example, after officials spent \$40 million to build iProvo in Utah, the network became so financially troubled that it was sold to Google for \$1. Burlington Telecom's broadband services to residents and business that began in 2005 had racked up \$50 million in debts by 2009. The city reached a \$10.5 million settlement over loans BT failed to pay back.

Obama's January speech hyped Cedar Falls, Iowa's network, where supposedly "you can get a 'gig' ... for less than many Americans pay for premium cable." But as the Center for Boundless Innovation in Technology's Fred Campbell has shown, "[t]he price of a 1 gigabit per second (Gbps) Internet subscription in Cedar Falls is nearly 2 times higher than the average price of a premium cable package and costs more than the top-of-the-line programming packages."

The Constitution prohibits Obama's push for FCC preemption favoring local government broadband. Federalism is principally about relationships between federal and state power. States are sovereign entities according to the Constitution's text, structure, and history. Local governments are not. States create local governments and define their powers. U.S. Supreme Court precedents going back to the early 19th Century deem local governments the convenient instrumentalities of states. The discretion states enjoy over them is nearly unfettered.

It would be contrary to constitutional logic and state autonomy for the FCC to grant local governments powers their states have denied them. The Supreme Court has recognized this. In *Nixon v. Missouri Municipal League* (2004), the Court rejected federal preemption of state prohibitions on telecommunications services. The Court expressed concern about a federal "one-way ratchet" of local governments providing services in perpetuity, unaccountable to state legislatures. Preemption would forever forbid states from changing policies regarding local government telecom networks, even in cases of financial disaster or abuse of power.

It appears likely the FCC — a so-called "independent agency" — will follow Obama's charge. Congress must stop the FCC. Or hope the courts come to federalism's rescue. Otherwise, the free market for innovation and investment will be jeopardized by unaccountable government ownership of broadband.

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