Chapter 3
Legal and Political Barriers to Municipal Networks in the United States

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ABSTRACT

The United States has been one of the most active countries in the deployment of municipal broadband networks. In America, many remote areas have no Internet access or are served by a single provider that might not meet local needs. Increasingly, access to the Internet is vital for social and economic development as well as prosperity. Without access, rural areas lose economic competitiveness and have lower quality of life standard of living. An attractive solution for such localities is to provide Internet access themselves, provided they believe that their area will realize significant benefits from it. However, the States' complex legal frameworks are a significant barrier to local network success. Each state makes its own laws governing its municipalities, and states have almost unfettered ability to constrain, either by ban or by lesser restraint, the emergence of local networks. These states are further influenced by the lobbying of incumbent service providers. Moreover, judicial remedies can be used strategically by incumbents to hinder, delay, or prevent local networks from succeeding. Despite all this, local networks can be and have been successful. This chapter discusses various legal and political barriers to municipal networks and explores case studies with the goal of learning from past successes and failures.

INTRODUCTION

The Internet, since inception, has become a bastion of commerce, democracy, and community. Access to the Internet has become vital for improving standard of living as well as economic and social prosperity. Yet, there are some areas of the U.S. that are not served by private service providers. Others are underserved as they have slow Internet speed or broadband subscription prices are prohibitive. Crawford (2011) termed this problem the "communications crisis in America." Assessments of this nature are further corroborated by recent report by the Organization for Economic Cooperation and Development (OECD) that shows that the U.S. ranked eighteenth in advertised Internet speeds (OECD, 2011) and fourteenth in total fixed broadband penetration rate (OECD, 2010).[1] A viable and effective solution is to allow those underserved communities or their local government to build networks for themselves through a community or municipal project (Abdelaal & Ali Khazanchi, 2009). Municipal networks have the potential to disrupt the telecommunication industry. Therefore, municipal networks are under vigorous attack by incumbent service providers that stand to protect their market share, revenue, and monopoly power. Some municipalities could overcome these attacks. However, municipalities should be aware of the legal and political barriers they may face and this is the focus of this chapter.

Unfortunately, the U.S. legal framework regarding municipal networks is inconsistent and constantly changing. The lack of substantive federal policy relevant to municipal networks, a tapestry of state laws forms the framework within which municipalities must maneuver. The majority of states have not enacted relevant legislations, but about twenty states have (Baller, 2012a). Some of these legislations address a specific technology such as wireless (Wi-Fi or WiMAX), fiber-optic lines, Digital Subscriber Line (DSL), cable services, broadband over power lines, telephone, or any medium that transfers voice, video, or data. Others are based on the entity such as the municipality itself, an electric or power utility, or political subdivisions. For simplicity, this chapter will use the term "municipal networks" to refer to all types of networks, unless otherwise specified.

As part of the planning stage of creating a municipal network, a municipality should consider the likelihood of being sued, the likelihood of a lobbying battle in the state legislature, as well as how costly it will be (in both time and money) to overcome any regulatory barriers. Combined, these barriers may seem substantial, but they can be planned for in advance and adequately handled. The costs they incur may be slight in comparison to the vast social and economic benefits that the network will provide. The positive externalities or "spillovers" brought about by increased Internet access, while they cannot be accounted for monetarily, are abundant and should not be overlooked or underestimated (Frischmann, 2012, pp. 317-318).

This chapter discusses the legal and political challenges facing municipal networks. It will introduce the topic by discussing the current federal regulatory framework. It will then provide a detailed account of legislative developments at both the federal and state level. Then, it will detail the strategies used to halt, delay, and hinder municipal networks. The chapter concludes with lessons learned from case studies discussed therein and a summary checklist for municipalities.

BACKGROUND

In 1934, the Communications Act of 1934 was passed ushering in an era where communications technology would be available to more people. Unfortunately, the law brought about monopolistic behavior from telecommunications (mainly telephone) providers by the early 1980s (Travis, 2006, pp. 1707-1710). Overall, the industry lacked effective government oversight. By 1984, this brought about the divestiture of the primary long-distance

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