

FCC Preempts State Control of Local Broadband Operations

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On March 12, the Federal Communications Commission (FCC) released the full text of its order preempting state regulation of municipal broadband service (the "Municipal Broadband Order"). As in the Open Internet proceeding, the FCC concluded that Section 706 of the Telecommunications Act of 1996 gives the agency a broad mandate to take almost any action it deems necessary to remove barriers to broadband deployment.

Both North Carolina and Tennessee had granted limited authority to their municipalities to provide broadband service. Local jurisdictions in both states petitioned the FCC, asserting that the limitations imposed by their respective state governments on their authority to offer broadband constituted barriers to broadband deployment that should be preempted by federal law. The FCC agreed, granting the petitions and indicating that it would look favorably on similar petitions from other cities and states. The Commission concluded that it cannot preempt state bans on municipal broadband service, but that once a state has authorized some provision of broadband service, Section 706 permits the FCC to remove any limitations on that grant.

The Open Internet and Municipal Broadband Orders stake out a significant expansion of the FCC's conception of its authority to regulate broadband services. The FCC is signaling its willingness to use Section 706 as a free-standing grant of power to identify and remove barriers to broadband deployment, even where those "barriers" are the result of the separate law and policy judgments of state legislatures about the authority and operation of their own internal political subdivisions.

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The FCC Preempts Two State Regimes

The Electric Power Board of Chattanooga, Tennessee (EPB) asked the FCC to preempt Tennessee statutory language, restricting it to providing broadband and video service "within its [electric] service area." The City of Wilson, North Carolina sought preemption of a bill enacted in 2011 that imposed geographic restrictions and other limitations on municipal broadband offerings in North Carolina.

As the FCC explained, "Both EPB and Wilson want to expand to serve their neighbors but are precluded by the state laws at issue here. In Tennessee, state law imposes a flat limitation on municipal electric service providers providing broadband and video outside their electric service territory, despite the fact that they are authorized to provide telecommunications services beyond their territory, and the services likely would be provided over the same infrastructure. In North Carolina, the restriction takes the form of a series of costly hoops through which a service provider must jump."

In a comment cycle, states and others opposed preemption of these regimes, but the FCC agreed with EPB and Wilson, and found that the challenged regulations interfered with broadband deployment and were subject to preemption by the FCC.

The Commission found it has broad preemption authority under Section 706(a)'s instruction to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" by using "regulating methods that remove barriers to infrastructure investment." ¶ 9. It also relied on Section 706(b), which states that if the FCC concludes that advanced telecommunication services are not being deployed fast enough, it shall "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.*

The FCC rejected arguments that Section 706 cannot authorize this preemption because of the "clear statement rule" in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in which the Supreme Court made clear that federal interference with states' internal affairs demands a clear direction from Congress. The FCC held that *Gregory* is inapplicable to interstate communications regulation because of the long-standing federal presence in this area, and distinguished state laws that target the regulation of broadband once a state has permitted cities to provide service from laws that go to the "historic police powers of the States." ¶ 154.

The FCC used these same grounds to distinguish *Nixon v. Missouri Municipal League*, 541 U.S. 125 (2004), in which the Supreme Court rejected the use of preemption under Section 253 of the Telecommunications Act to try and scuttle a state's ban on political subdivisions offering service. ¶ 156. In *Nixon*, the Court found that preemption would have interfered with "States' arrangements for conducting their own governments" and that the statutory provision relied on did not satisfy *Gregory's* clear statement rule. In the Municipal Broadband Order, the FCC held that *Nixon* was "centered on a state's flat ban on political subdivisions entering the market at all" which the FCC determined is "different from a situation in which a state has permitted a political subdivision to enter the market as a broadband provider, but also seeks to impose regulations on the municipal provider in order to effect separate communications policy goals." *Id.*

The Move is Controversial

A number of state associations opposed the FCC's actions, which also drew sharp rebukes from Commissioners Pai and O'Rielly. Commissioner Pai's 13-page dissent argues the FCC is unlawfully re-writing state law, ignoring the teachings of *Gregory* and *Nixon*, and improperly relying on Section 706. Noting the unique power each state has in empowering and regulating local governments, Commissioner Pai remarked that "if section 253 could not clear the high hurdle presented by *Gregory*, section 706 falls even further short of the mark." He went on to highlight what he sees as the absurdity of the FCC's approach, which yields "an exceptionally strange result. While a state would be free to ban municipal broadband projects outright, it would be forbidden from imposing more modest restrictions on such projects."

Commissioner O'Rielly also dissented. Commissioner O'Rielly emphasized that he is not opposed to preemption generally, and notes its importance in many areas. But the Commission's "illogical and tortured reading of section 706 of the Telecommunications Act" is not the sort of clear Congressional direction that can suffice to support preemption under federal law. He also voiced his "profound opposition to the offering of broadband or any communications service by a government entity, in this case a municipality," an issue on which Commissioner Pai reserved judgment.

The Decision has Broad Implications

The direct effect of the Municipal Broadband Order is limited to the two entities that petitioned the FCC, and thus the order only preempts laws in Tennessee and North Carolina. However, the Order states that "[w]hile the present Memorandum Opinion and Order (Order) only addresses the EPB and Wilson Petitions, the Commission will not hesitate to preempt similar statutory provisions in factual situations where they function as barriers to broadband investment and competition." ¶ 16.

Ironically, the FCC's action may create a strong disincentive to state experimentation. The FCC concedes that it cannot *require* states to allow local governments to offer broadband under *Nixon*, but claims broad power to review and reject state regulation of such service, once it is allowed in any form. As Commissioner Pai observed, this may cause states to hesitate or rethink allowing local governments to experiment with broadband, because they won't be able to control it.

Finally, the FCC's sweeping view of its authority under Section 706 has little in the way of limiting principle. If the FCC finds that removing any state regulation, regime or activity has the potential to speed broadband deployment, under the Commission's view it is not only empowered but obligated to preempt it.