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Perspectives from FSF Scholars

August 19, 2016

Vol. 11, No. 30

Rescuing Broadband from Government Interference: The FCC Overstepped in Allowing Municipalities to Own Networks

by

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[The Washington Times](#)

August 17, 2016

Since late 2014, the Federal Communications Commission's quest for power to shape the Internet's future has gone into overdrive. Government interventionism puts at risk the entrepreneurial environment in which the commercial Internet emerged and on which it still depends. Fortunately, a decision by a federal appeals court halted one of the FCC's most audacious overreaches to date.

Promoting local government ownership of broadband Internet networks has become one of the bureaucracy's aims under FCC Chairman Tom Wheeler. But about 20 states limit their local governments' ability to become broadband businesses. The FCC made its first move to sweep away such laws in March 2015. The agency issued an order to preempt North Carolina's and Tennessee restrictions on their local governments' ownership of broadband Internet networks. Although the FCC is a so-called "independent agency," President Obama endorsed its efforts.

There are strong reasons why many states consider it a bad idea for local governments to go into the broadband business. Government shouldn't compete against the market providers they also regulate. Conflicts of interest posed by local governments' dual role creates risk of favoritism over private market providers in granting permits and licenses. The threat of unfair treatment chills investment by private market providers.

Local governments also lack capacity to successfully operate risky broadband ventures. Their broadband networks have a record of financial failures. In many cases, local taxpayers have been left on the hook for multimillion-dollar bailouts of local government broadband flops. Local governments' budgets have also been severely constrained by those failures.

By its preemption order, the FCC would have effectively given local government-owned networks in Tennessee and North Carolina a right to operate outside their own boundaries. Those local governments would have enjoyed discretionary power never bestowed by the states that created them. It's Constitutional Law 101 that local governments are political subdivisions of their states. And states have nearly unfettered discretion in defining the purposes and boundaries of their subdivisions. But the FCC's preemption order would have turned both state-local government accountability inside out.

Thankfully, on Aug. 10, the U.S. Court of Appeals for the 6th Circuit reversed the FCC's preemption order. The court ruled that Congress never provided a clear statement of authority for the FCC to preempt state laws concerning their local governments' ownership of broadband networks. It rejected the FCC's claim that general statutory language about promoting competition and removing infrastructure barriers showed any intent by Congress to mangle states' internal governance. In other words, the court found nothing in the federal Telecommunications Act to authorize the FCC's bold attempt to reassign state governmental decision-making.

The 6th Circuit's decision faithfully followed U.S. Supreme Court precedent. When a federal agency interposes itself between a state and its political subdivisions, the Supreme Court requires a clear statement of Congress's intent to authorize such preemption. As the 6th Circuit recognized, the clear statement rule is grounded in "fundamental constitutional policy" respecting state sovereignty.

Importantly, reversal of the FCC's preemption order halted future agency adventurism. Had its order had been upheld in court, the FCC would certainly have preempted the remaining dozen-and-a-half state laws restricting local government ownership of broadband networks. Also, a court ruling upholding the FCC's anti-federalism foray would have supplied a disturbing precedent for other overreaching federal agencies to exploit.

The 6th Circuit's decision is a welcome rebuke of one of the boldest overextensions of authority in the FCC's history. The appeals court's reversal of the FCC offers hope that the agency's other endeavors to increase government's control over the digital future will eventually be held accountable to the rule of law.

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