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FCC Preemption of State Bans on Municipal Broadband Networks Is Most Likely Unlawful

by

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Following its second stinging judicial rebuke in as many attempts to impose Internet regulations, the FCC is now gearing up for a third try. A [February 19 statement](#) by FCC Chairman Tom Wheeler outlined a new plan to exert FCC power over broadband Internet services. Not surprisingly, the plan calls for re-thinking the FCC's already overanalyzed legal rationale for imposing network neutrality rules.

What might surprise is the plan's call to examine state laws that keep local governments out of the Internet business. It hints at federal preemption of state-level restrictions on municipal broadband projects.

But preemption would undermine local government accountability to state governments and to taxpayers. Any FCC attempt to interfere with the relationship between states and their local governments will run up against basic free market and federalism principles.

Nearly twenty states restrict local government entry into the business of providing broadband Internet services. Such laws prevent local government conflicts of interest with the private sector marketplace competitors who invest tens of millions of dollars in localities to build out their

broadband networks. They also protect local taxpayers from potentially devastating financial losses from poorly-run municipal broadband projects.

Federal law contains no clear statement authorizing preemption of state restrictions on their cities and counties going into the telecommunications or broadband Internet business. No matter how broad its regulatory power under *Verizon v. FCC* – and it is not likely to be as broad as the Commission surmises – the FCC cannot interfere with state control over cities and counties absent a clear statement of intent by Congress.

FCC preemption of state restrictions on government-owned broadband projects would violate constitutional federalism principles. Local governments are creations of the states. It would be constitutionally improper for a federal agency to turn counties or cities into separatist enclaves by granting them powers that their respective states never delegated to them in the first place.

The U.S. Supreme Court previously rejected federal law preemption of state prohibitions on telecommunications services. In *Nixon v. Missouri Municipal League* (2004), the Supreme Court expressly rejected claims that Section 253(a) of the Communications Act preempted a statute prohibiting its cities and counties from offering telecommunications services. The Court based its decision on the "clear statement" rule and constitutional federalism problems posed by preemption of fundamental state sovereign functions.

Also, a 1997 order by the FCC rejecting preemption of a Texas restriction on local governments providing telecommunications services is an agency precedent that weighs against preemption. Should the FCC attempt preemption in the future, it would have to offer a reasonable explanation for disregarding the reasoning behind its 1997 order.

In short, states that safeguard taxpayers from financially risky government-owned broadband ventures, most of which lose money, are safeguarded by constitutional principles and precedents. Rather than restrict states' ability to ensure the financial soundness of their cities and counties, the FCC should look to promote successful private sector-led investment in faster and better broadband networks. When it comes to local barriers to broadband investment, the FCC should seek ways to end rights-of-way discrimination, streamline tower siting rules, reform franchising processes and fees, and clear away other red tape.

Flimsy Foundation for FCC Preemption of State Restrictions on Municipal Broadband Projects

Chairman Wheeler's statement comes in the wake of the D.C. Circuit Court of Appeals' ruling in [Verizon v. FCC](#) (2014). In that decision, the D.C. Circuit struck down the FCC's attempt to regulate broadband Internet services. However, the D.C. Circuit concluded the FCC has *some* authority to regulate broadband Internet services under Section 706 of the Communications Act. The Chairman's statement marks the start of the FCC's renewed attempt to use that disputed authority.

The Chairman's half dozen point plan concluded with the following item:

6. Enhance competition. The Commission will look for opportunities to enhance Internet access competition. One obvious candidate for close examination was raised in Judge Silberman’s separate opinion, namely legal restrictions on the ability of cities and towns to offer broadband services to consumers in their communities.

Now Senior Judge Laurence Silberman’s concurring opinion in *Verizon v. FCC* criticized the agency in terms even stronger than the D.C. Circuit’s majority. But the Chairman’s statement seized on a strange footnote in Judge Silberman’s concurrence that said: “An example of a paradigmatic barrier to infrastructure investment would be state laws that prohibit municipalities from creating their own broadband infrastructure to compete against private companies.”

The footnote concluded with a hyperlink to a May, 2013 [Wired magazine article](#) that advocated for government-run broadband projects. The article praised the [highly indebted](#) and [controversial](#) municipal broadband operation in [Chattanooga, Tennessee](#). And the article ignored the financial debacles resulting from several municipal broadband projects across the country, such as [iProvo](#), [UTOPIA](#), and [Mooresville and Davidson, North Carolina](#).

Of course, concerns about financially disastrous municipal broadband projects and the fallout for local taxpayers have led approximately 20 states to place various restrictions on government’s entry into the broadband business. Several states outright prohibit muni broadband projects. Other states impose certain procedural safeguards, such as requiring a local vote of the people for approval. The American Legislative Exchange Council (ALEC) takes the latter approach through its [Municipal Telecommunications Private Industry Safeguard Act](#).

Moreover, many states have considered it improper to put local governments in direct competition with private sector providers of broadband Internet services and to risk precious taxpayer dollars. Assuming a dual role as public authority and as competing business proprietor poses inherent conflicts-of-interest for local governments. Such conflicts lend themselves to abuses of government power.

In any event, a footnote consisting of a single sentence plus a one-sided hyperlink discussing a point not directly at issue – or dicta – in a concurring judicial opinion supplies paltry support for FCC preemption. And as will be discussed below, precedents from the U.S. Supreme Court, the D.C. Circuit, and the FCC all cut against preempting state restrictions on local government forays into the broadband Internet business.

Federalism Principles and Precedents Prohibits FCC Preemption of State Restrictions on Municipal Broadband Projects

FCC preemption of state restrictions on local government ownership of broadband networks would be a misguided inversion of federalism principles. No clear statement exists in federal law to permit preemption of state restrictions on muni broadband. Constitutional federalism principles forbid preemption of state policy choices restricting muni broadband. The U.S. Supreme Court has

already rejected similar preemption claims made against a state. And even FCC precedent stands opposed to preemption.

First, federal law contains no clear statement authorizing preemption of state restrictions on their cities and counties going into the telecommunications or broadband Internet business. The actual extent of FCC power to regulate the Internet following the D.C. Circuit's January decision in *Verizon v. FCC* remains uncertain. But no matter how broad its regulatory power, the FCC cannot interfere with state control over cities and counties absent a clear statement of intent by Congress. U.S. Supreme Court decisions such as *Gregory v. Ashcroft* (1991), require Congress speak with unmistakable clarity before federal preemption of "a decision of the most fundamental sort for a sovereign entity" will be considered. Concerns for "the usual constitutional balance of federal and state powers" ground the Supreme Court's clear statement rule.

Second, even assuming Congress spoke with unmistakably clear language, FCC preemption of state restrictions on government-owned broadband projects would violate constitutional federalism principles. Local governments are creations of the states. Quoting early 20th Century precedent, the Supreme Court reaffirmed in *Ysursa v. Pocatello Education Association* (2009) that "[s]tate political subdivisions are 'merely ... department[s] of the State, and the State may withhold, grant, or withdraw powers and privileges as it sees fit.'"

Local governments remain accountable to public policy choices made in state constitutions and by state legislatures. It would be constitutionally improper for a federal agency to turn counties or cities into separatist enclaves by granting them powers that their respective states never delegated to them in the first place. And it would create bizarre results to grant counties or cities a federal right against their respective states to enter the broadband Internet business but otherwise leave states free to restrict them as they see fit. Needless to say, it would be highly illiberal and undemocratic to preempt – and thereby eliminate – local voter approval requirements for municipal broadband projects.

Third, the U.S. Supreme Court has previously rejected federal law preemption of state prohibitions on telecommunications services. In *Nixon v. Missouri Municipal League* (2004), the Supreme Court expressly rejected claims that Communications Act Section 253(a) preempted Missouri's statute prohibiting its cities and counties from offering telecommunications services. The Court based its decision in *Nixon* on the clear statement rule and constitutional federalism problems. According to the Court's 8-1 majority, "[t]here is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not."

In *Nixon*, the Supreme Court also expressed concern over the federal "one-way ratchet" resulting from local governments being able to provide services in perpetuity, unaccountable to state legislative control. For instance, suppose a state's local governments failed to operate broadband networks in a financially responsible manner or abused their powers to give their networks an unfair competitive advantage. If preempted, such a state would be forbidden to ever change its policy by withdrawing its local governments from the broadband Internet business.

Nixon also favorably cited the D.C. Circuit’s ruling in *City of Abilene v. FCC* (1997). In *City of Abilene*, the D.C. Circuit upheld the FCC’s conclusion that Section 253(a) did not preempt a Texas law prohibiting its municipalities from providing telecommunications services.

In any event, the FCC’s 1997 order constitutes agency precedent that would also weigh against any future attempt by the Commission to preempt state restrictions on municipal broadband projects. In that order the FCC recognized the federalism principles at stake. In particular, the FCC astutely rejected the claim that preemption would be permissible because it would be aimed at the state’s proprietary activities, not its governing activities. It stated: “states maintain authority to determine, as an initial matter, whether or to what extent their political subdivisions may engage in proprietary activities.” Should the FCC attempt preemption in the future, it would have to offer a reasonable explanation for disregarding the reasoning behind its 1997 order.

Nixon, *City of Abilene*, and the FCC’s 1997 order all address Section 253(a)’s provision that “No State or local statute or regulation, or other State or local legal requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunication service.” But a clear statement of Congressional intent to preempt fundamental aspects of state sovereignty is also lacking in Section 706(a)’s provision that the FCC shall accelerate deployment of advanced telecommunications capability to all Americans by “utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” Even assuming such a clear statement could be read into Section 706, the same federalism principles identified in *Nixon*, *City of Abilene*, and the FCC’s 1997 order supply solid barriers to federal preemption.

Conclusion

States that safeguard taxpayers from dicey government-owned broadband ventures are safeguarded by constitutional principles and precedents. Rather than restrict states’ ability to ensure the financial soundness of their cities and counties, the FCC should look to promote successful private sector-led investment into faster and better broadband networks. When it comes to local barriers to broadband investment, the FCC should seek ways to end rights-of-way discrimination, streamline tower siting rules, reform franchising processes and fees, and clear away other red tape.

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