



Net neutrality was just the start. Can the FCC keep states from banning public Internet?

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While everyone's worked up about how to keep the Internet an open platform, another little-known controversy is quickly gaining steam. How it plays out could determine whether millions of Americans get to build their own, local alternatives to big, corporate ISPs such as Comcast and Verizon.

Last night, House lawmakers pushed through legislation that would effectively undo those prospects for many cities around the country. In an amendment to a must-pass funding bill, Republicans led by Rep. Marsha Blackburn of Tennessee approved an amendment that would prohibit federal regulators from ensuring cities' ability to sell their own high-speed broadband directly to consumers.

Cities have lately been taking matters into their own hands, attempting to lay down publicly owned fiber optic cables where they say there are gaps in coverage, quality or price from incumbent ISPs. In Blackburn's state, Chattanooga has emerged as a prominent example of a city that successfully challenged the status quo; the local government now offers 1 Gbps service for \$70 a month. (Those speeds are roughly 100 times faster than the national average.) Longmont, Colo. is also moving forward with its municipal broadband project despite earlier resistance from the cable industry.

In Longmont and various other jurisdictions, though, state laws have made it difficult if not impossible for cities to build their own broadband networks. Some states, like Colorado, require voter referendums to reach a certain threshold before it'll let cities proceed. Google Fiber reportedly passed over Boulder, Colo. because of such restrictions, meaning that consumers missed out on a potentially game-changing service.

Other states have sought to ban municipal networks outright: Earlier this year, Kansas tried to outlaw city broadband before public opposition convinced the legislature to back down. New Mexico is also considering a ban.

The Federal Communications Commission has signaled its intention to intervene, saying that its congressional charter, the Communications Act of 1996, gives it the authority to overturn or "preempt" the state-level restrictions. A federal court seemed to agree with that interpretation of the law in January when it wrote that the bans posed a "paradigmatic barrier to infrastructure investment" that the FCC is empowered to move against.

"If the people, acting through their elected local governments, want to pursue competitive community broadband, they shouldn't be stopped by state laws promoted by cable and telephone companies that don't want that competition," wrote FCC Chairman Tom Wheeler in a recent blog post.

But opponents of intervention argue that whatever the law says about the FCC's authority, the agency must first deal with a higher constitutional problem. By leaping into the municipal broadband debate, the FCC would be inserting itself into the relationship between states and their cities — a potential no-no when it comes to the issue of federalism.

There's some precedent for this situation. In 2001, a Supreme Court case known as *Nixon v. Missouri Municipal League* found that the FCC's preemption power — found under a part of the Communications Act called Section 253 — couldn't be used in the city context. The Court argued that states should be allowed to prevent cities from building and providing their own telecommunications services, and that Congress, in writing the Communications Act, probably never intended to let the federal government free municipalities from state regulations.

In a bicameral letter to the FCC last month, Sen. Ed Markey (D-Mass.), one of the original co-authors of the Communications Act, effectively said the Court got it all wrong.

"It was the intent of the Telecommunications Act of 1996 to stimulate more innovation and consumer choice," Markey wrote, along with a number of other lawmakers including Sens. Al Franken, Amy Klobuchar, Cory Booker and Reps. Henry Waxman and Anna Eshoo. "We urge you and your colleagues to utilize the full arsenal of tools Congress has enacted."

Municipal broadband advocates admit that whatever Congress may have meant to say, the Supreme Court's interpretation is problematic.

"Nixon is a precedent to be dealt with," said Matt Wood, policy director for the consumer group Free Press. "Though the FCC's statutory authority argument may be different this time."

What Wood is talking about is the FCC's attempt to use a different part of the Communications Act to justify its preemption power. That's Section 706, the same part of the law that's supporting the agency's new net neutrality rules. It's not clear whether the FCC can successfully argue the point. But Republicans don't seem open to letting Wheeler try.