

# Sixth Circuit Reverses FCC's Preemption of State Laws on Municipal Broadband

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Yesterday, the U.S. Court of Appeals for the Sixth Circuit reversed the FCC's order preempting Tennessee and North Carolina laws that prevented municipalities from deploying cable services, video services, and Internet services beyond their current territorial boundaries to underserved nearby areas. [The decision](#) is a setback for Chairman Wheeler, who had pushed the preemption decision through as a means to promote broadband deployment. Republican Commissioners [Pai](#) and [O'Reilly](#) – who had dissented from the order – hailed the court's decision as vindication and urged the Commission to change its policy approach to broadband deployment. The [Chairman's statement](#) appeared to concede that the Commission would not address municipal broadband again, offering instead that he would testify in support of state legislation removing bans on municipally-owned broadband services.

The Court's decision was based on last year's preemption by the FCC of most of the Tennessee and North Carolina laws because it would further the statutory interest of increasing broadband investment under Section 706 of the Telecommunications Act of 1996. However, the Court concluded that "no federal statute or FCC regulation *requires* the municipalities to expand or otherwise to act in contravention of the preempted state statutory provisions." Instead, federal statutes and FCC regulations permitted providers to choose the geographic area that they serve.

The Court found that the FCC's preemption order merely attempted to decide who gets to make the choice of whether to expand geographically, the state or municipalities. Under these circumstances, the Court found that Congress must clearly articulate the FCC's power to preempt a state law in a clear statement specifically authorizing preemption, treating the federal statute "with great skepticism and read in a way that preserves a State's chosen disposition of its own power." The FCC's reliance on Section 706 was therefore found to be fatal to its preemption determination under this analysis. The Court noted the aspirational nature and absence of express language referencing regulation of public entities in that Section, and concluded that "Section 706 cannot be read to limit a state's ability to trump a municipality's exercise of discretion otherwise permitted by regulations." However, the Court carefully explained that its decision did not reach whether or not Section 706 has any preemptive power, only that that Section could not be used to preempt state laws regulating municipalities.

Yesterday's holding is a setback for the FCC and for at least some municipal broadband

deployments. Its ultimate effect on broadband deployment is disputed (among the Commissioners in particular), but appears to end the FCC's involvement in promoting publicly owned broadband deployments. Entities deploying broadband services should look to state laws and regulations for guidance on such deployments.