Insight

FCC's Overreach on Government Run Networks Gets Rebuke From Court

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Under Chairman Wheeler's tenure, the Federal Communications Commission (FCC) has come under intense scrutiny for pushing the bounds of its legal authority in rulemakings. A federal appeals court just invalidated one such order by the agency, which would have overruled legislation passed by states to manage government-run broadband networks. Make no mistake. This case was all about the limits of the FCC's power.

Government run networks have had a tumultuous past. In the early 2000s, countless cities across the U.S. developed city run Wi-Fi networks. While there was optimism early on, the lack of sustainable business models forced many of the projects to shut down by the end of the decade. Philadelphia's experiment with city Wi-Fi was indicative of the boom and bust cycle other cities had experienced. After countless years of experimenting with business models and tepid demand, the network finally shut down with a bill that was nearly triple the initial projections. In countless other cities, taxpayers ended up having to foot the bill for their own failed Wi-Fi projects.

AAF previously examined the residential fiber broadband offerings by municipalities and found the plans were 20 to 50 percent more costly to consumers than private broadband providers.

Naturally, states have adopted rules to administer these city and municipal level networks. What do the laws looks like? As we noted before,

> "Colorado specifies that municipalities must conduct a referendum before offering a service. Utah places certain administrative obligations on the projects and stipulates that a feasibility study be conducted. Under Louisiana law, certain benchmarks must be met while Florida requires that the project break even within four years and that a tax be applied. It is hardly out of the ordinary to have these kinds of limitations, especially since Wisconsin's statute on municipal borrowing and bonds runs just over 19,000 words, making this section an 80 page novella."

The FCC sought to preempt these rules at the federal level, but the court just put a stop to it. Falling in line with what the Supreme Court had written in *Nixon v. Missouri Municipal League*, a case on the same issue of FCC preemption, the court rebuked the agency, saying:

> "This preemption by the FCC of the allocation of power between a state and its subdivisions [municipalities] requires at least a clear statement in the authorizing federal legislation. The FCC relies upon [Section] 706 of the Telecommunications Act of 1996 for the authority to preempt in this case, but that statute falls far short of such a clear statement."

The FCC has yet to outline what it sees as the limits of its power since it was first given broad authority under Section 706 of the Telecommunications Act. The Commission should craft a statement of policy akin to the Federal Trade Commission's Policy on Unfairness outlining the limits of their authority under Section 706, and

how they intend to use this authority. Policymakers should also consider ways to limit the FCC's unchecked authority. Until then, the FCC will continue to push its authority, putting consumer welfare and taxpayers at risk.