

FCC's Municipal Broadband Loss Cuts Off Policy Options

By Jenna Ebersole

Law360, Washington (August 17, 2016, 4:22 PM ET) -- The Federal Communications Commission's Sixth Circuit loss last week over its push to promote expanded municipal broadband by preempting state laws leaves the FCC with little recourse but to ask a likely reluctant Congress for new authority, experts said.

The FCC likely knew that it would face an uphill battle in relying on Section 706 of the Telecommunications Act of 1996 to override laws in North Carolina and Tennessee in what some saw as a lawless move, telecom attorneys told Law360. The agency now appears to be without a path to accomplish its policy objectives, experts said.

The court ruled that the commission lacked authority to issue its so-called preemption order that came after Chattanooga, Tennessee, and Wilson, North Carolina, petitioned the agency to take action against state laws that restricted them from offering access to their public broadband networks to neighboring communities.

The commission's effort seemed to be at least a stretch, telecom attorneys said, and the decision is narrow and straightforward in ruling that Congress did not plainly grant the preemption authority. The FCC is unlikely to challenge the ruling, they agreed, and is left without a way to move forward without congressional action.

"After the election, if the makeup of Congress is different than it is now, the scope of the FCC's preemptive authority can be revisited," Jack Nadler of Squire Patton Boggs LLP said. "Certainly, if there is a Communications Act rewrite over the next few years, this will be one of the many issues that will need to be considered. But I expect that, for the moment at least, people are going to move on to the other issues."

The FCC's order, issued early last year, was designed to lift restrictions that the agency claimed were pushed by "incumbent" service providers to "block consumer choice," but the appeals panel said the agency lacked the authority to dictate how states regulate their towns.

Such federal overrides require "a clear statement" that they're authorized by federal legislation, the panel said. The FCC relied on Section 706, but the panel ruled that the statute "falls far short of such a clear statement."

The FCC could challenge the ruling for en banc rehearing or petition for Supreme Court review, but attorneys said they see either move as unlikely. Paul A. Werner of Sheppard Mullin Richter & Hampton

LLP said Chairman Tom Wheeler's reaction appeared to be fairly muted, as did statements from the other Democrats.

"I think he recognized the hurdles that this posed," Werner said of Wheeler. "I don't see it as a decision that really merits Supreme Court review either."

Werner said reviewing other policy paths will be the task for the next commission, determined by the outcome of the November election. But even so, it could be difficult to find another basis for intervening.

"I think the Sixth Circuit pretty much shut them down unless they can find some additional authority," he said.

Still, the loss is fairly minor compared to an issue such as net neutrality, he said. The FCC's track record in the courts is always a "mixed bag" and the FCC's move was aggressive in seeking to accomplish a policy priority, even if it was in good faith.

Laura Phillips of Drinker Biddle & Reath LLP said the court did not rule on the FCC's policy position, which some could argue was valid even if it didn't have authority. The commission saw circumstances that "cried out for a remedy" and took its best shot, she said, considering that neighbors across the street from each other could have access to vastly different levels of broadband speeds.

"If they hit that home run, that would have been great," she said of the FCC. "Are they really that much worse off by a reversal here? It's basically back to status quo if they hadn't done anything."

Phillips said she expects the FCC, depending on the election's outcome and the next president's agenda, to engage with leadership of the House on this and similar issues next year.

The decision returns power to the states, experts said, though how that affects the continued rollout of broadband services by municipalities will likely vary significantly across the country.

In practice, Nadler said, the outcome could actually prompt states to allow the services. The FCC had argued that while it can't force states to allow municipal broadband, if they do, then the commission can intervene to block limitations of it, he said.

That could have incentivized states to ban it entirely, Nadler said.

"I think the court's decision creates the ability for states to experiment with municipal broadband," he said. "A state can say, 'We don't want to give the municipalities carte blanche, but we will give them limited authority to participate in this market.'"

On the other hand, privately owned incumbent providers remain powerful and are "likely to continue to use their political muscle" to stop municipal broadband, he added. The Sixth Circuit's decision places the question in the hands of voters electing state legislators or federal lawmakers who could conclude state policies interfere with federal broadband goals.

"The effect will be different in different states," he said.

Overall, Samuel L. Feder of Jenner & Block LLP said he always questioned the legality of the FCC's move

but believes it was effectively meant to send a message about the policies and practices in states.

"I think they had to know they had very little chance of winning that lawsuit," he said.

Feder said the commission's actions highlighted state laws that benefit providers economic interests.

"I think that it helps the FCC, just the attention it's gotten, because I think it just shed light on these sort of protectionist policies, whether you're for them or against them," he said.

Nadler said he operates under the assumption that the FCC only adopts rules that it believes it can sustain in court, but the process of losing on the issue did raise its profile. For now, he expects the agency to focus on big-ticket items, such as unlocking the set-top box and regulation in the market for business data services.

"Bob Dylan famously said, 'You don't need a weatherman to know which way the wind is blowing,'" he said. "I think the commission will accept the court's decision with good grace and move on to finish the chairman's very ambitious agenda in the limited time that remains in this administration."

--Additional reporting by Bill Donahue. Editing by Katherine Rautenberg and Philip Shea.