Achieving universal broadband: What the FCC can and cannot do

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It's long-accepted common knowledge that high-speed internet access is a key to education, economic growth and even maintaining interpersonal connections. While the internet began as a public venture, in the last 20 years the private sector has provided the public with broadband connectivity. Internet service providers like Comcast and Charter have

built out networks covering large swaths of the U.S., and for years have effectively monopolized internet connections to homes and businesses.

Because they operate with little or no competition, these companies have little incentive to upgrade their networks or reduce prices. This has left the country that invented the internet ranked 30th in the world for internet speed and affordability.

Communities frustrated with their available options – or without any options at all – have taken on the challenges of delivering fast and cheap internet for themselves. Often this municipal broadband service is far better than the alternatives: In Chattanooga, Tennessee, for example, the municipal network is almost 100 times faster than the national average internet connection speed.

For the consumer this means faster Netflix streaming, clearer Skype conversations, faster downloads, better gaming and quicker uploads for video, documents and pictures. It also means stronger health care provision, emergency preparedness and business advantages.

That's why it was disappointing to learn of last month's Sixth Circuit Court of Appeals decision that upheld laws in North Carolina and Tennessee that discourage the growth of municipal broadband. The ruling overturned a 2015 decision by the Federal Communications Commission that voided these laws in the interest of promoting greater broadband access. How the issue gets resolved from here will affect American connectivity, competitiveness and communities. With all five members of the FCC slated to testify before Congress this month, in a general hearing about the commission's work, it's important to understand the legal and regulatory gymnastics that got us here in the first place.

Understanding federal broadband governance

By law, the FCC is charged with promoting advanced telecommunications (including broadband internet service) and eliminating regulatory barriers to broadband deployment where they exist. The specific section authorizing much of its power is Section 706 of the Telecommunications Act of 1996, which is vaguely worded. Through several years of court rulings, this part of the law has become both a powerful tool in the FCC's regulatory arsenal, and its Achilles' heel when interpreted by the courts.

Back in 1998, the FCC thought all Section 706 contained was a requirement to issue an annual report on broadband connectivity. (The most recent Broadband Progress Report was released in January.) But recently, the commission looked again at Section 706 and found justification for more robust action.

Since 2005, the FCC and internet companies like Comcast and Verizon have been engaged in a series of federal court battles that have both expanded the FCC's power under Section 706 and defined legal limits to it. A common thread has involved courts making a technical, bureaucratic finding: The Telecom Act gave the FCC broad powers – but only if the commission formally declared what jurisdiction it was claiming. Several times, the FCC exercised powers before announcing it had them, and was blocked by the courts.

Enter municipal broadband

While these arguments were moving through the courts, communities were tired of waiting for high-quality high-speed internet service. The first municipal broadband projects launched over a decade ago, and the numbers have swelled. In 2015 there were over 450 communities across the country offering some form of municipal broadband.

This success made large internet companies nervous – faster service at lower prices was a threat to their business model. They began lobbying state legislatures to pass laws obstructing or even banning municipally run internet services. They argued that government shouldn't be involved in providing broadband because public funds could be subsidizing competition with private businesses. The argument was successful: To date, 20 states have passed laws limiting or barring the development of municipal broadband.

In 2014, two municipal governments – the Electric Power Board of Chattanooga, Tennessee, and Wilson, North Carolina – petitioned the FCC to preempt their respective state prohibitions on municipal broadband. The towns wanted to be able to continue offering broadband even though their states had outlawed it. In early 2015, the FCC agreed, ruling that laws in Tennessee and North Carolina were barriers to broadband deployment – a violation of Section 706. Federal law trumped state law, and legal choke holds on municipal broadband fell.

As happens so much in telecommunications regulation, the states sued, challenging this threat to their jurisdiction. Last month, the Sixth Circuit overturned the FCC's ruling, saying the commission had too broadly interpreted its authority under Section 706. This came despite the fact that the 1995 Senate report on the drafting of Section 706 makes clear that lawmakers intended the FCC to act just as it had.

Missed opportunities?

The FCC's statement that it will not appeal the ruling signals that the commission is accepting limits on its power to promote expansion of broadband services. But it has not yet fully pushed the boundaries within those constraints.

For example, its 2016 Broadband Progress Report found that many

Americans in rural communities and on tribal lands lack broadband connectivity. This is just one of many examples of a well-documented "digital divide" between rural and urban America.

It is exactly instances like these for which Section 706 was created – to correct for times when the market has failed to deliver vital communication services to Americans. To be sure, the commission has launched several programs to address this problem and used Section 706 as justification, but the full parameters of what it can do under 706 have gone unexplored. How, for instance, might the FCC's power be used to promote or encourage public networks, beyond just overruling state laws? How far does the commission's authority stretch? Could, for example, the FCC construct its own broadband networks in places without service from private companies?

When the law was being written back in 1995, the Senate specifically suggested that the FCC could use its power under Section 706 to actively, even aggressively, ensure that all Americans had access to high-speed broadband. This legislative intent, and the courts' findings that much of the FCC's authority is up to the agency itself, seems to give the FCC the regulatory teeth to ensure internet companies advance this important goal; perhaps it's time to take stock of these teeth.

Into the future

If policymakers were to do this, Congress could amend the Telecommunications Act to add more specific language to 706, specifying what the FCC can and cannot do. Despite the occasional rumbling, however, reopening the act has never found much support among lawmakers, industry or activists.

More likely would be for the FCC to open a formal proceeding to explore all of its options, and the full extent of its jurisdiction – again,

something encouraged in the legislative history. The Sixth Circuit's decision throwing out municipal broadband provides the perfect opportunity to reevaluate all of the interlocking issues associated with broadband.

The digital divide is not shrinking as fast as it could be, and universal broadband is only becoming more of a necessity for participation in American society, culture and business. What action the FCC takes now – and how it interprets the range of its power – will send an important message to all Americans about their connected future.

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