

Some cities want to offer publicly owned internet access. A new ruling makes that harder.



A federal appeals court has [rejected](#) an Obama administration regulation that aimed to clear the way for cities to build their own broadband networks. The ruling means that it will be a lot harder for cities in certain states to offer a "public option" for broadband service in competition with private cable and telephone companies.

The court decision is doubtless being celebrated by big telecommunications companies, who would prefer not to face competition from the public sector. But the fight isn't over. The ruling wasn't about the merits of city-owned broadband services. It simply held that Congress never gave the Federal Communications Commission the authority to second-guess states that wanted to regulate what their own municipalities did in the broadband market. If Congress wanted to, it could change the laws to facilitate municipal broadband.

This means that what happens next depends on who wins the elections in November. If Hillary Clinton is elected president, we can expect her to continue President Barack

Obama's efforts to promote municipal broadband. But if Republicans maintain control of Congress, there may not be much she can do on the issue, as Wednesday's court ruling strictly limited the FCC's power to act unilaterally.

Supporters of city-owned internet access vowed to carry on the fight after the ruling. The state laws at issue in the case were "written by telecom industry lobbyists to protect incumbents like AT&T and Comcast from competition," says Joshua Stager, a municipal broadband advocate at the New America Foundation. "Similar laws exist in other states, and they all need to go."

Democrats and Republicans have been feuding over this issue for years



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Rep. Marsha Blackburn (R-TN) is a leading opponent of publicly owned internet access.

When Americans want to sign up for residential internet access, their options are often limited to a cable company like Comcast or Time Warner or a phone company like Verizon or AT&T. But a few cities across America have sought to provide their residents with a

third option: broadband networks provided by the city government itself.

Advocates say that this model can lead to better service at lower prices. They often point to Chattanooga, Tennessee, whose publicly owned broadband service was one of the first in the country to offer 1 Gbps service, which is still more than 10 times faster than the average home internet service today.

In the last few years, the Obama administration has been fighting with state governments and big telecommunications companies over the future of these municipal broadband services. Many states have placed restrictions on city-provided broadband services. The Obama administration responded by preempting those laws and guaranteeing cities the right to build their own broadband networks if they want to.

House Republicans weren't happy about this, though. When Federal Communications Commission chair Tom Wheeler announced that he was working on the proposal, the [House passed legislation](#) by Rep. Marsha Blackburn (R-TN) blocking Wheeler's regulations and preserving states' authority over municipal broadband efforts. However, that legislation never became law.

But while Congress wasn't able to stop Wheeler's proposal, the courts are a different story. When the FCC announced its new regulations, the states of Tennessee and North Carolina sued to stop their enforcement. Now a federal appeals court has sided with the states, ruling that the FCC exceeded its authority.

The courts said preemption trampled on state authority

The FCC faced an uphill battle because the courts have long been skeptical of federal efforts to regulate the relationship between states and local governments. Constitutionally speaking, counties, cities, and other municipal governments are considered mere political subdivisions of the states in which they're located. States generally have unfettered powers to regulate how they're run and what they can do, and the courts have been reluctant to second-guess state rules about municipal decision-making.

Even more ominous for the Obama FCC, [the Supreme Court ruled against the FCC](#) on a very similar issue in 2004. Congress had given the FCC the power to preempt laws that restrict the development of broadband networks in 1996, and the FCC used that power to preempt a Missouri law banning cities from building broadband networks.

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But the Supreme Court ruled that this law exceeded the FCC's authority. The high court said that Congress had only allowed the FCC to preempt restrictions on the development of *private* broadband networks. Missouri cities are creatures of the state government, the high court reasoned in its 2004 ruling, and so consequently the Missouri government has broad authority to decide which functions to delegate to municipal governments.

On Wednesday, the Sixth Circuit Appeals Court had little difficulty applying this same logic to the Obama FCC's regulations. "The political subdivisions of a state are nothing more than that state's 'convenient agencies,'" a two-judge majority wrote. "The state generally retains the power to make discretionary decisions for its subdivisions, just as a board of directors generally retains the power to make discretionary decisions for a company."

"What the FCC seeks to accomplish through preemption is to decide who—the state or its political subdivisions—gets to make these choices" about whether and how to build broadband networks, the court wrote. Because this is such a potential can of worms, the court ruled, Congress must be super-clear that this is what it had in mind. And the law the FCC relied on doesn't specifically authorize this kind of preemption. Instead, it simply empowers the FCC to take "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

The next step depends on what happens in November



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This issue has become increasingly partisan in recent years, with Republicans — both at the state level and in Congress — generally being more skeptical of municipal broadband projects than Democrats.

And that means that right now, the FCC is stuck. It could appeal the ruling to the Supreme Court, but the Court might not take it, and in any event there's little reason to think that any of the Supreme Court's four conservative justices would reach a different conclusion than the Sixth Circuit did.

The other option is to ask Congress to revise the law and give it clear authority to preempt state laws that restrict municipal broadband networks. But congressional Republicans have made it clear they're not going to go along with this kind of proposal. So as long as Speaker Paul Ryan runs the House or Sen. Mitch McConnell runs the Senate, further legislative action on this front is unlikely.

So the one thing that would allow the FCC to push forward with its proposal would be a sweeping Democratic victory in the November election. If Hillary Clinton won the White

House and Democrats captured Congress in the process, then it's possible to imagine a Democratic majority writing new, stronger legislation empowering municipalities to offer internet service.

The final option for municipal broadband advocates is to win more elections at the state level. The municipal broadband debate is less partisan at the state level than it is in Congress. In Tennessee, for example, a proposal to allow more municipal broadband was [championed by a Republican](#) from Chattanooga.

On the other hand, incumbent telecommunications companies have a lot of influence with state legislatures, and they've managed to convince some Democrats as well as Republicans to oppose municipal broadband projects. So in many states, the future doesn't look that bright for city-owned internet service.

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