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Express and Conflict Preemption of State Net Neutrality Efforts

by

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I. Introduction

For the fourth time in the past decade, the D.C. Circuit is considering the Federal Communications Commission's regulation of broadband network management practices.[1] And while the case is captioned *Mozilla v. FCC*, twenty-two states and the District of Columbia have joined the petition for review. Their participation highlights an important aspect of the case not foreseen by most pundits when the Commission's *Restoring Internet Freedom Order* ("*RIF Order*") was adopted: whether policymakers may reimpose at the state level regulations repealed by the federal government.

The *RIF Order* expressly preempted state efforts to regulate net neutrality, and the states in turn have challenged this provision.[2] If upheld, the *RIF Order*'s preemption provision likely dooms most state net neutrality initiatives. But importantly, even if the court rejects the agency's express preemption arguments, conflict preemption principles are likely to invalidate state efforts that upset the carefully-crafted policy balance exhibited in the Commission's order.

II. State Net Neutrality Efforts and Express Preemption

Following the adoption of the *RIF Order*, several states took steps to recreate net neutrality restrictions that the agency had repealed. At least six governors adopted some form of restriction by executive order, which require broadband providers to adhere to net-neutral principles as a condition of doing business with the state.[3] Four others have enacted legislation to regulate broadband providers directly.[4] The most aggressive of these statutes, California, extends beyond the now-defunct *Open Internet Order*'s prohibition on blocking, throttling, and paid prioritization, to regulate zero-rating and interconnection agreements.

But the *RIF Order* contains a preemption provision. Like the 2015 *Open Internet Order* that it replaced, the *RIF Order* expressly preempts "any state or local measures that would effectively impose rules or requirements" that the order repealed or rules that would otherwise be "inconsistent with the federal deregulatory approach" taken in the order.[5] Specifically, the order preempts "any so-called' economic' or 'public utility-type regulations, including common-carriage requirements akin to those found in Title II" of the Communications Act.[6] Notably, it also contains a savings clause: the order "do[es] not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives."[7]

The *RIF Order*'s preemption provision reflects the Commission's long-standing "policy of nonregulation to ensure that Internet applications remain insulated from unnecessary and harmful economic regulation at both the federal and state levels."[8] In 2004, at the dawn of the Internet age, the agency formally preempted any state regulation of information services that would "conflict with our policy of nonregulation."[9] It grounded this approach in its Bell-era policy that "enhanced services would continue to develop best in an unregulated environment" and explained that the 1996 Telecommunications Act "increases substantially the likelihood that any state attempt to impose economic regulation" would conflict with this policy.[10] As Free State Foundation Senior Fellow Seth Cooper noted in an earlier *FSF Perspectives*,[11] the Eighth Circuit upheld this policy in 2007, explaining that "deregulation" is a "valid interest[] the FCC may protect through preemption of state regulation."[12] The same court reiterated this conclusion last year, holding that "'any state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law."[13]

The *Mozilla* petitioners nevertheless argue that the order's preemption provision is invalid. Their argument is that the Commission has interpreted the Communications Act to prevent the agency from regulating broadband service. The *RIF Order* disclaims authority to regulate broadband under Title II, and petitioners argue that the agency failed to identify a jurisdictional hook upon which to hang Title I ancillary authority. Because the Commission found that it lacked authority to regulate broadband, petitioners argue, it similarly lacks authority to preempt state regulation.

The agency responds that under the Communications Act, broadband access is an interstate service that should be subject to one uniform federal regulatory regime rather than a patchwork of state regulations. Reiterating the justifications cited in the *RIF Order*, the Commission argues that under Section 2 of the Act, the Commission may preempt state law when it is impossible or

impracticable to regulate the intrastate portion of a service without affecting the interstate component.[14] It also relies on the policy of nonregulation of information services discussed above.

Petitioners' anti-preemption argument is clever, and it may succeed in defeating the specific bases for preemption cited in the order. But while this argument might insulate states from express preemption, ultimately it misunderstands the full import of the *Restoring Internet Freedom Order*. When the Commission's action is properly understood, one realizes that the agency need not rely on express preemption alone because as explained below, most, if not all, state net neutrality regulations fail under principles of conflict preemption.

III. State Net Neutrality Efforts and Conflict Preemption

Conflict preemption occurs when it is impossible for a party to comply with state and federal law, or when state law interferes with the accomplishment of a federal objective.[15] Most state net neutrality laws fall in the latter category. As the Commission alludes to in its appellate brief, the *RIF Order* is best understood as an exercise of the agency's judgment regarding federal policy objectives. The Commission chose one regulatory design from a wide range of potential options available under the Act. In the *Brand X* decision,[16] the Supreme Court held that the Telecommunications Act's definitional constructs were ambiguous, and therefore the Commission was free to classify broadband Internet access service as either a Title I information service or a Title II telecommunications service. Moreover, the agency has authority to regulate information services under its ancillary authority to regulate interstate communications by wire or radio, as long as that regulation is related to the performance of a statutory objective. And it has authority to forebear from applying particular provisions of Title II.

Legally, this flexibility creates a wide range of potential broadband regulatory schemes, all of which are permissible under the Communications Act as interpreted by *Brand X*. On one end of the spectrum, it could opt for a policy of complete nonregulation. On the other end, it could apply the full panoply of common carriage obligations under Title II. In between are a variety of potential bundles of either Title I or Title II-lite regulatory regimes.

The *RIF Order* represents the agency's policy judgment regarding the optimal regulatory bundle from among these options. Contrary to petitioners' claim, the Commission did not completely foreswear any jurisdiction over broadband access. Rather, the agency opted to classify broadband as an information service and subject it to extensive transparency and disclosure obligations. But it decided against more intensive common carrier-like economic restrictions, because in its judgment, general consumer protection and antitrust remedies provide adequate protection for consumers and more intrusive regulations could have adverse effects on consumers and innovation.

State net neutrality efforts would upset this carefully-calibrated federal regulatory scheme. California, for example, would make the following practices unlawful:

- Blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management;

- Impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device, subject to reasonable network management;
- Requiring consideration, monetary or otherwise, from an edge provider;
- Engaging in paid prioritization;
- Engaging in zero-rating for consideration;
- Zero-rating some Internet content, applications, services, or devices in a category, but not the entire category;
- Unreasonably interfering with, or unreasonably disadvantaging, an end user's ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to end users.

Some of these prohibitions were contained in the Obama-era *Open Internet Order*, but were explicitly repealed by the *RIF Order* for reasons that the Commission took great pains to explain and justify. Others are prohibitions that even the *Open Internet Order* chose not to adopt, again for good reason. By imposing obligations that the agency explicitly chose to repeal, California and other states interfere with the *RIF Order*'s careful balance of regulatory obligations and freedoms.

As noted above, the Supreme Court has stated clearly and repeatedly that the Supremacy Clause preempts state laws that "frustrate the accomplishment of a federal objective."[17] Where, as here, an agency has adopted a "careful regulatory scheme" that balances trade-offs between more and less onerous requirements, states may not upset that balance. This case is analogous to *Geier v. American Honda Motor Company*.[18] To promote greater highway safety, the Department of Transportation adopted a regulation requiring auto manufacturers to equip some, but not all, of their vehicles with passive restraints such as airbags.[19] The standard deliberately sought a mix of different restraints to be phased in over time, and rejected an all-airbag standard because of concerns about public backlash.[20] The plaintiff, injured in an automobile crash, alleged that failure to provide an airbag violated state tort law despite being in compliance with the federal standard. But the court found the state tort claim was preempted, because a "rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed."[21]

Significantly, this conflict preemption does not depend upon the existence of an express preemption clause. The regulatory scheme in *Geier* included a provision expressly preempting inconsistent state safety standards.[22] The court held this express clause was inapplicable to Geier's suit because a tort action is not a safety standard.[23] But it explained that the existence of an inapplicable preemption provision, "by itself, does not foreclose (through negative implication) "'any possibility of implied [conflict] pre-emption.'"[24] Similarly, even if the *Mozilla* court invalidates the *RIF Order*'s express preemption provision, individual state net neutrality efforts would be subject to a conflict preemption analysis—a fact that the state petitioners conceded at oral argument.

Moreover, when conducting this analysis, the court will give weight to the agency's own views regarding when state initiatives conflict with the federal objective in question. As the Supreme Court explained, "[t]he agency is likely to have a thorough understanding of its own regulation and its objectives and is 'uniquely qualified' to comprehend the likely impact of state requirements."[25] Here, the *RIF Order* clarified that "common-carriage requirements akin to those found in Title II," as well as any other obligation equivalent to "rules or requirements that we repeal or refrain from imposing today," would "pose an obstacle to or place an undue burden on the provision of broadband Internet access service" and would there "conflict with the deregulatory approach we adopt today."[26] "In these circumstances," held the *Geier* Court, "the agency's own views should make a difference."[27]

Nor can states avoid preemption by substituting the power of the purse for the power to regulate directly, as various executive orders seek to do. While a state may perhaps attach conditions to services that it purchases for its own use, "courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power."[28] For example, the Supreme Court preempted a Wisconsin statute that prohibited the state from contracting with certain repeat violators of the National Labor Relations Act, on the ground that the additional penalty increased, and therefore conflicted with, the remedial scheme provided under the Act; the Court found it immaterial that "Wisconsin has chosen to use its spending power rather than its police power."[29]

Crosby v. National Foreign Trade Council is also instructive.[30] In the late 1990s, the federal government enacted a measured set of economic sanctions against Burma.[31] Massachusetts enacted its own statute that prohibited the state from contracting with companies that did business with Burma, even if those companies were in compliance with the federal regime.[32] Like the net neutrality executive orders, the goal was to put pressure on companies to adopt voluntary practices that federal law refused to impose directly. Yet the Court unanimously preempted the Massachusetts law because it "conflicts with federal law at a number of points by penalizing individuals and conduct that Congress has explicitly exempted or excluded from sanctions" in "clear contrast to the congressional scheme."[33]

It is possible that the *Mozilla* court will refrain from making a blanket determination about conflict preemption between the *RIF Order* and various state net neutrality initiatives. After all, conflict preemption typically requires a finding that the state rule actually conflicts with, or poses an obstacle to, a federal objective. The court may prefer not to make this determination in the abstract, instead deferring until faced with an actual conflict with a specific state statute. But this means that even if the states succeed in striking down the express preemption provision, the Commission or affected parties may nonetheless challenge individual state net neutrality initiatives on conflict preemption grounds – and, as noted above, the state petitioners conceded as much.

IV. Conclusion

Unquestionably, state regulators historically have played an important role in communications regulation. But unlike telephone communication, which can be neatly segmented into intrastate and interstate components, broadband is inherently an interstate service. As the latter replaced

the former as America's primary communications network over the past two decades, state regulators transitioned to a less active role.

The reassertion of state authority in the past year was not driven by regulatory necessity, but by politics. But political disagreements alone cannot change the nature of the regulatory environment governing broadband. As the *RIF Order* notes, states will continue to play a role in broadband regulation by enforcing general consumer protection laws alongside the FCC and the Federal Trade Commission. But preemption doctrines rightly prevent the states from balkanizing the Internet, according to the dictates of multiple regulatory regimes, in ways that interfere with the judgments of the federal government's primary communications regulatory agency.

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[1] Mozilla v. FCC, No. 18-1051 (D.C. Circuit, scheduled for argument Feb. 1, 2019); United States Telecom Ass' n v. FCC, 825 F.3d 674 (D.C. Cir. 2016), *pets. for reh' g en banc denied*, 855 F.3d 381 (D.C. Cir. 2017); Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).
[2] See Restoring Internet Freedom, 33 FCC Rcd. 311, 427-429 (2018).
[3] See Hawaii Exec. Order No. 18-02, available at https://governor.hawaii.gov/wp-content/uploads/2018/02/Executive-Order-No.-18-02-Net-Neutrality-Signed.pdf; New Jersey Executive Order 9, available at https://nj.gov/infobank/eo/056murphy/pdf/EO-9.pdf; New York Executive Order 175, available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_175.pdf; Montana Executive Order No. 3-2018, available at http://governor.mt.gov/Portals/16/docs/2018EOs/EO-03-2018_Net%20Freedom.pdf?ver=2018-01-22-122048-023; Rhode Island Executive Order 18-02, available at http://files.constantcontact.com/572742fa401/711096bd-4372-46f2-9ae9-f8e117ea5ec3.pdf; Vermont Executive Order 2-18, available at https://governor.vermont.gov/sites/scott/files/documents/EO%2002-18%20-%20Internet%20Neutrality%20in%20State%20Procurement%20-%20Final.pdf.
[4] See SB 822 (California), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB822; HB4155 (Oregon), available at https://olis.leg.state.or.us/liz/2018R1/Measures/Overview/HB4155; S289 (Vermont), available at https://legislature.vermont.gov/bill/status/2018/S.289; HB2282 (Washington), available at http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/House/2282-S.SL.pdf.
[5] Restoring Internet Freedom, 33 FCC Rcd. 311, 427 (2018).
[6] *Id*. at 428.
[7] *Id*.
[8] Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor Telecommunications Service, 19 FCC Rcd. 3307, 3307 (2004).
[9] *Id*. at 3316.
[10] *Id*. at 3318.
[11] Seth Cooper, *State Executive Orders Reimposing Net Neutrality Regulations Are Preempted by the* Restoring Internet Freedom Order, Perspectives from FSF Scholars, Vol. 13, No. 5 (2018).
[12] Minnesota Public Utilities Commission v. FCC, 483 F.3d 570, 576 (8th Cir. 2007).
[13] Charter Advanced Services (MN) LLC v. Lange, 903 F.3d 715, 718 (8th Cir. 2018) (quoting *Minnesota Public Utilities Comm' n*, 483 F.3d at 580).
[14] See Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) (recognizing impossibility exception).
[15] Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 873 (2000).
[16] Nat' l Cable & Telecomms. Ass' n v. Brand X Internet Servs., 545 U.S. 967 (2005).

[17] *Geier*, 529 U.S. at 873.
[18] *Id*. at 861.
[19] *Id*. at 864.
[20] *Id*.
[21] *Id*. at 863.
[22] *Id*. at 867.
[23] *Id*.
[24] *Id*. at 869 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995)).
[25] *Id*. at 883 (quoting Medtronic v. Lohr, 518 U.S. 470, 496 (1996)).
[26] Restoring Internet Freedom, 33 FCC Rcd. 311, 428 (2018).
[27] *Geier*, 529 U.S. at 883.
[28] Cardinal Towing & Auto Repair v. City of Bedford, 180 F.3d 686, 692 (5th Cir. 1999); see also Wisconsin Department of Industry, Labor and Human Relations v. Gould, 475 U.S. 282 (1986).
[29] *Gould*, 475 U.S. at 289.
[30] 530 U.S. 363.
[31] *Id*. at 368.
[32] *Id*. at 376.
[33] *Id*. at 378.