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Net Neutrality Is A Federal Issue

by
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With network neutrality legislation stalled in the United States Congress and the Federal Communications Commission taking a minimalist approach, advocates of stronger network neutrality regulation have begun to turn to state regulators to secure more stringent regulation.[1] For example, a bill introduced in the Maryland General Assembly on February 9 states that a broadband provider "should not provide or sell...any service that provides, degrades, or gives priority to any packet source over that company's broadband Internet access service based on its source, ownership, or destination...."[2]

Moving regulatory fights from federal to state regulatory fora (or vice versa) has a venerable history in telecommunications, and the Communications Act has attempted in many regards to preserve substantial regulatory authority at both the state and federal levels. The list of such multi-jurisdictional fights is long: ranging from fights over deregulation of customer premises equipment (CPE) in the Bell era, to conflicts over local cellular and cable regulation, to more recent battles over video franchising reform and the permissibility of municipal-

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[1] *See* Michael Martinez, *"Network Neutrality" Controversy Arises in Michigan Video Bill Debate*, N.J. Telecom Update, Nov. 28, 2006 (available at http://www.njtelecomupdate.com/).

[2] Maryland House Bill 1069 (introduced Feb. 9, 2007). The bill also requires broadband providers to provide periodic reports on the number of customers served, the speeds and types of service offered, and the like. Broadband service providers are defined to include digital subscriber line (DSL), cable, wireless, and broadband over power lines providers (BPL).

provided wireless. In each case, a party who could not entirely prevail at one level moved the fight to another. Interestingly, the regulatory level at which one chooses to fight is not dictated by whether one is seeking a regulatory or deregulatory outcome.

Although some issues in telecommunications have salience at more than one jurisdictional level, network neutrality is the quintessential federal issue. First, applications and content on the Internet are distributed nationally – and internationally. Almost never will a user access only in-state websites. Network neutrality regulation addresses the relationship between Internet access providers on the one hand and applications and content providers on the other. As a matter of telecommunications doctrine, therefore, network neutrality is a federal issue. Indeed, the FCC has already defined what it considers to be the best network neutrality regime: a general statement of policies to be applied, if necessary, on a case-by-case basis. State attempts to regulate in this area are therefore preempted.

Second, Internet access providers themselves have national footprints, design their networks based on national business practices, and advertise in national media. As a matter of policy, any fragmentation caused by different state network neutrality rules would introduce inefficiencies at a time when expanding the availability of broadband is a high national priority.

A Bit of History

Although the Communications Act of 1934 expressly retained state authority over "intrastate communications service,"[3] the past four decades have seen a steady federalization of telecommunications law. The Telecommunications Act of 1996 capped that trend, by granting the Federal Communications Commission extensive authority over local exchange carriers. Much of the federalization of telecommunications has been in the service of deregulation, as markets have become increasing competitive.

Although the 1934 Act's retention of state jurisdiction seemed "to divide the world of domestic telephone service into two [regulatory] hemispheres,"[4] that division has never been practical. "[V]irtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and thus is conceivably within the jurisdiction of both state and federal authorities."[5] The Supreme Court's holding in *Louisiana PSC* that state depreciation standards could stand independently depended on a metaphysical separation of equipment, possible only by running two sets of artificial accounting records to track the cost of the very same telephone plant.

[3] 47 U.S.C. § 152(b).
[4] Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986).
[5] *Id*.

But metaphysical separation of policy is not usually possible, and FCC authority to enforce its deregulatory policies has been consistently upheld. When the FCC in the 1970s deregulated the consumer equipment market, by allowing the connection of all registered equipment, courts upheld FCC orders preempting contrary state regulation. As the Fourth Circuit said, "separation of terminal equipment used exclusively for local communication is a practical and economic impossibility."[6] The DC and Second Circuits similarly affirmed the FCC's facilities interconnection policies, preempting state regulation that attempted to maintain the Bell monopoly, because interconnection could only be determined on a single jurisdictional basis – state and federal separation was either impossible or bad policy.[7] Indeed, as FCC preemption extended even further into traditional state realms, such as the preemption of state rate regulation for CPE, the courts emphasized that federal preemption did not require that separation be "impossible." State policy was also preempted where "state regulation . . . would interfere with the achievement of a federal regulatory goal. [C]onflicting state regulations must necessarily yield to the federal regulatory scheme."[8]

This broad notion of federal preemption was temporarily narrowed by the Supreme Court's decision in *Louisiana PSC*. But the Supreme Court did maintain the FCC's authority to preempt state regulation where separation was impossible.[9] And impossibility was not limited to technical impossibility, but also encompassed situations where a state rule "negate[d]" a federal one.[10] Under this standard, the Ninth Circuit has upheld the FCC's preemption of state regulation of enhanced services.[11] This is especially relevant here because, as will be seen below,[12] today's broadband Internet services are unregulated "information services" under the 1996 Telecommunications Act's regulatory scheme, and information services are essentially the equivalent of the pre-1996 Act's enhanced services.[13] Importantly, the Ninth Circuit held that the FCC's preemption authority was the same whether it acted under Title II's common carrier regulation or its more general Title I authority over enhanced services.[14]

Revisions to the Communications Act over the past 20 years have similarly increased federal authority over communications services of all kinds. The 1984 and 1992 Cable Acts increased the federal role in cable regulation, forbidding

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[6] North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1043 (4th Cir. 1977) (affirming FCC order permitting interconnection of all registered equipment).
[7] California v. FCC, 567 F.2d 84 (D.C. Cir. 1977) (per curiam); New York Tel. Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980).
[8] CCIA, 693 F.2d at 214.
[9] Louisiana Pub. Serv. Comm'n, 476 U.S. at 375-76 n.4.
[10] *Id*.
[11] California v. FCC, 39 F.3d 919 (9th Cir. 1994).
[12] See pages 4-5 *infra*.
[13] All of the services the FCC previously considered to be "enhanced services" pre-1996 Act are "information services" under the 1996 Act regime. *See* Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended, *First Report and Orderand Further Notice of Proposed Rule Making,* 11 F.C.C.R. 21905, paras. 102-04 (1996).
[14] *Id*. at 932.

exclusive municipal franchises, greatly limiting other franchise terms, and forbidding state and local imposition of common carrier regulations on cable services.[15] In 1993 and 1996, Congress preempted state regulation of mobile wireless services.[16] For its part, the 1996 Act specifically forbade any state or local regulations that "may prohibit or have the effect of prohibiting" entry into any "interstate or intrastate telecommunication service."[17] "Congress . . . ended the longstanding regime of state-sanctioned monopolies."[18] The central local competition provisions gave the FCC authority to make rules governing local practices that previously would have been under local jurisdiction.[19]

Federal Net Policy Occupies the Field

Congress and the Supreme Court have confirmed that the Federal Communications Commission has the primary role in determining regulatory policy for the Internet. In the 1996 Act, Congress tasked the FCC with taking measures to ensure that broadband services came to all Americans: section 706(b) of the Act empowers the FCC to take action if it determines that advanced telecommunications services are not being adequately deployed.[20] Congress has also stated that U.S. policy is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation" and "to promote the continued development of the Internet."[21]

More generally, the Supreme Court, if only obliquely and in dicta, has suggested that the FCC's Title I authority may extend to regulation of Internet access service. In the *Brand X* decision, the Supreme Court said that the FCC has authority under its Title I ancillary jurisdiction "to regulate" interstate and foreign Internet services.[22] At issue in that case was, of course, the regulatory treatment of cable broadband service.

The FCC's actions to date leave no room for state network neutrality regulations. In several overlapping proceedings, the Commission has made clear that federal policy is to deregulate broadband services. The Commission has specifically declared that broadband access providers should be able to choose *not* to offer service as common carriers, and that such freedom is important for the development of broadband networks. Network neutrality rules simply

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[15] *See* 47 U.S.C. §§ 541-545.
[16] 47 U.S.C. § 332(c).
[17] 47 U.S.C. § 253(a).
[18] AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 371 (1999).
[19] *See generally id.*
[20] *See* Telecommunications Act of 1996, § 706(b), 47 U.S.C. § 157 note ("If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.").
[21] 47 U.S.C. § 230(b).
[22] National Cable & Telecommunications Ass'n v. Brand X Internet Servs., Inc., 545 U.S. 967, 976 (2005).

resurrect common carrier nondiscrimination requirements; they therefore are directly contrary to the Commission's policy judgment.

The FCC's position on broadband deregulation is clear from three groups of proceedings: its preemption of state regulation of applications-based VoIP and similar services, its classification of broadband access services as information services not subject to common carrier rules, and its own limited network neutrality policy statement.

Preemption of State VoIP Regulation. The FCC has preempted state regulation of applications-based VoIP service. In the *Pulver.com* order, concerning Pulver's Free World Dialup (FWD) VoIP service, the FCC made clear "that Internet applications [should] remain insulated from unnecessary and harmful economic regulation at both the federal and state levels."[23] Speaking directly to state regulation, the Commission said that, "consistent with our precedent regarding information services, . . . FWD is an unregulated information service and any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation."[24] Similarly, the Commission preempted Minnesota's application of traditional regulation to Vonage's VoIP service, saying that it "cannot be separated into interstate and intrastate communications for compliance with Minnesota's requirements without negating valid federal policies and rules."[25]

In the *Vonage* Order, the FCC referred to the impossibility of separating federal and state regulation of Internet services and sessions. "This 'impossibility' results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communications session and to perform different types of communications simultaneously, none of which the provider has a means to separately track or record."[26]

To be sure, Pulver and Vonage offered applications-based VoIP services: neither Pulver nor Vonage itself provided broadband access to end-users. But each of these decisions shows a clear intent that broadband Internet services remain unregulated, and the *Vonage* order in particular shows that Internet users simultaneously engage in intra- and interstate communications in a way that cannot be separated.

Wireline Broadband Services. The FCC's decision to classify wireline broadband services as information services and to permit broadband providers to

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[23] Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications nor a Telecommunications Service, Memorandum Opinion and Order, 19 F.C.C. Rcd. 3307, 3307 (2004).
[24] *Id*. at 3316.
[25] Vonage Holding Corp. Petition for a Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, Memorandum Opinion and Order, 19 F.C.C. Rcd. 22404, 22404 (2004).
[26] *Id*. at 22420.

choose to offer service on a non-common carrier basis further confirms that state net neutrality rules are inconsistent with federal policy. The FCC's ruling was clear that broadband providers "may choose" in what form they desired to offer service, in order to provide broadband carriers the "flexibility and freedom to enter into mutually beneficial commercial arrangements with particular ISPs."[27] The FCC specifically addressed proposals for nondiscrimination requirements for ISPs, in terms particularly applicable to the network neutrality debate, and rejected those proposals.

> [T]he inability to customize broadband service offerings inherent in the nondiscriminatory access requirement impedes deployment of innovative wireline broadband services taking into account technological advances and consumer demand. Thus, continuing to impose such requirements would only perpetuate wireline broadband access providers' inability to make better use of the latest integrated broadband equipment and would deprive consumers of more efficient and innovative enhanced services. Similarly, a continued requirement to provide any new broadband transmission capability to all ISPs indiscriminately, and provide advance notice thereof, would reduce incentives to develop innovative wireline broadband capabilities . . . . Thus, we reject these proposals.[28]

The net neutrality regulations being proposed today, which all include nondiscrimination mandates, are thus flatly inconsistent with the federal policy. A prohibition against prioritizing traffic, such as the one suggested by the just-introduced Maryland bill, is surely a nondiscrimination requirement that may well, in the FCC's words, "perpetuate [the broadband providers'] inability to make better use of the latest integrated broadband equipment and would deprive consumers of more efficient and innovative enhanced services."

The FCC's Policy Statement. Although the FCC declined to impose nondiscrimination rules, it simultaneously adopted a Policy Statement embodying some of the principles of network neutrality.[29] The FCC made clear that this Policy Statement constituted its response to the claimed need for network neutrality rules, and that it did not believe that further regulation was appropriate.[30]

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The foregoing demonstrates that the FCC has occupied the field of network neutrality regulation. The FCC has consistently followed a policy of non-regulation of information services, and has applied that non-regulation to both

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[27] Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking, 20 F.C.C. Rcd. 14853, 14899, 14900 (2005) (¶¶ 86, 87).
[28] *Id*. at 14904-05 (¶ 97).
[29] *See* Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement, 20 F.C.C. Rcd. 14986 (2005).
[30] *See* Memorandum Order, *supra* note 27, at 14904 (¶ 96).

Internet applications and to broadband access providers. Network neutrality addresses the relationship between those two levels of the Internet, but the FCC wants that space to remain unburdened by traditional nondiscrimination rules. The FCC has adopted a federal policy favoring a minimally-intrusive approach, and any greater state regulation would be inconsistent with federal goals. As the FCC has found, there is no practical way to separate the intra- and interstate portions of an Internet session. It is simply impossible to imagine how a broadband access provider could apply one set of traffic principles to in-state content and applications and another to interstate. There is therefore no space in the field for state network neutrality regulation.

A Single Federal Focus Improves Broadband Policy

Federal preemption is not only the current policy as a doctrinal matter, it is the best policy for broadband regulation overall. Broadband providers now have regional or national footprints with corresponding technology that respects no state boundaries, engage in large-scale cross-state marketing, and introduce new services on a widespread basis. Differing state policies would increase broadband providers' costs in many ways, at a minimum increasing regulatory compliance costs and decreasing providers' efficiency of operating on a nationwide basis.

Federal preemption in other areas of communications policy has seemed effective in enhancing and maintaining competition. For example, federal preemption of commercial mobile services[31] regulation has helped cellular services to become the nationwide, competitive networks that they are today.[32]

Broadband policy generally, and network neutrality in particular, is an area in which spillovers from one jurisdiction to another can be expected. But Congress has declared that national policy is to encourage nationwide development of the Internet and to preserve its free market fundamentals and unregulated character. And common sense – recognized by the FCC – shows that consumers simultaneously and continuously use intra- and interstate resources during their Internet experiences. In light of already-announced Congressional and FCC policies governing broadband service, the States should be precluded from adopting net neutrality or net neutrality-like policies of their own.

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[31] 47 U.S.C. § 332(c).

[32] *See* Annual Report and Analysis of Competition Conditions with Regard to Commercial Mobile Services, Eleventh Annual Report, at 3 (2006) (¶ 2) (concluding that there is "effective competition" among cellular companies) (available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-142A1.pdf).