Perspectives from FSF Scholars
November 26, 2013
Vol. 8, No. 31

Cooperative Federalism and the IP Transition: The Need to Clarify Federal Jurisdiction Over IP-based Services

by

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Last week the National Association of Regulatory Commissioners (NARUC) held its 125th annual meeting. The NARUC Committee on Telecommunications unanimously passed a resolution adopting a white paper, which called for greater cooperation between federal and state regulators to ensure the reliability of telecommunications networks and the satisfaction of consumer needs. The resolution and white paper address timely issues, given the recent hearing by the House Subcommittee on Communications and Technology on The Evolution of Wired Communications Networks on October 23, the IP Transition Proceeding, and the ongoing debate over the extent to which IP-based services should be subject to federal or state jurisdiction.

Now is an important time for state regulators and the FCC to consider anew their respective roles in implementing the cooperative federalism programs set out in the Telecommunications Act of 1996. I commend NARUC for taking a closer look at these issues, and for reaffirming the role of states in providing oversight of intrastate services and local issues, particularly in the realms of consumer protection, network reliability, public safety, and emergency preparedness. NARUC also recognized in its white paper that "the FCC should determine the regulatory status of VoIP and other IP-enabled services," specifically whether states or the FCC will be responsible for ensuring safe,

reliable, and available service for consumers. However, the white paper did not address *how* the FCC should handle the jurisdictional implications of the IP transition on state-federal cooperation.

With the transition to all digital networks rapidly progressing towards completion, the FCC should declare its exclusive jurisdiction over the economic regulation of IP-based networks. Because of the fundamentally interstate and international nature of IP-based services, and the impractical, if not impossible, task of making jurisdictional determinations regarding IP-based communications, IP-based networks should be subject to federal, not state, economic regulation. Otherwise, subjecting service providers to dual regulatory regimes will likely impede the continued upgrading and build-out of such advanced networks.

NARUC's recent resolution declared that the fundamental goals of the Telecommunications Act should continue to govern the regulation of communications networks despite the many technological developments that are underway, including the IP transition. The resolution stated, "changes to the underlying structure of the network or the technology used to carry information does not change the need for reliable, robust, affordable, and ubiquitous communications services." The resolution also proposed that any new federal legislation should focus on the principles of cooperative federalism, and should reserve a role for the states in any regulatory regime.

The white paper, released in September of this year and adopted by the resolution at NARUC's meeting last week, is entitled "Cooperative Federalism and Telecom in the 21st Century." It was authored by NARUC's federalism task force, which was charged with evaluating the role of the states in telecommunications regulation. The task force rightly recognized that "much has changed" since its initial report on federalism was published in July of 2005. Particularly, the authors noted that the revolutionary transition to IP-based networks posed new challenges regarding the shared authority of federal and state entities.

Despite fundamental changes to the technological landscape, the task force suggested that the FCC, states, and NARUC members should continue to focus on the basic goals of the 1996 Act and the principles of cooperative federalism developed by the task force: consumer protection, interconnection and call completion, public safety, evidence based decision-making, broadband adoption, access, and affordability, and universal service. The authors also stated that the states must continue to play a substantial and collaborative role in regulating communications networks regardless of the underlying technology, which would likely include a role in regulating IP-based services.

The NARUC white paper is fine as far as it goes. There is a role for states to play in promoting intrastate communications and achieving the fundamental goals of the 1996 Act. But it is important for the FCC to declare that communications utilizing IP-based networks are interstate in nature. Given the substantial change from analog to digital services, the mode in which IP-based networks operate renders determining the origin and destination of calls burdensome and impractical if not impossible. As such, the

ultimate jurisdiction over IP-based networks as far as economic regulation is concerned should be federal, subject to exclusively FCC, not state, authority. Otherwise, federal policies promoting investment in advanced digital networks are likely to be frustrated.

Cooperative Federalism and the 1996 Telecommunications Act

The concept of "cooperative federalism" refers to a principle, which delegates authority among federal agencies, state regulators, and federal courts to implement federal law. This principle and the programs enacted to embody it provide a means by which Congress can seek to achieve complicated regulatory goals. The definition of cooperative federalism offered by Philip Weiser, now Dean of University of Colorado School of Law, is widely accepted today:

> Cooperative federalism programs set forth some uniform federal standards—as embodied in the statute, federal agency regulations, or both—but leave state agencies with discretion to implement the federal law, supplement it with more stringent standards, and, in some cases, receive an exemption from federal requirements. This power allows states to experiment with different approaches and tailor federal law to local conditions.

In order for cooperative federalism to achieve particular legislative objectives, each federal and state entity must fully appreciate its respective role. As Dave Danner, Chairman of the Washington Utilities and Transportation Commission stated in a recent Federalist Society teleforum, "cooperative federalism requires an element of cooperation … the FCC has to make sure [it is] giving [the states] an audience."

The Telecommunications Act of 1996 included provisions that seem to promote cooperative federalism by dividing regulatory authority and enforcement responsibilities between the FCC and the states. In 2001, Philip Weiser, deemed the 1996 Act "the most ambitious cooperative federalism regulatory program to date," in the publication in which he defined cooperative federalism, "Federal Common Law, Cooperative Federalism and the Enforcement of the Telecom Act." However, in a seminal 1999 Supreme Court opinion, *AT&T v. Iowa Utilities Board*, Justice Scalia seemed to make clear that federal entities – the FCC and the courts – retain the ultimate authority under the Act regarding economic regulatory matters: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew."

Whatever the intention of the drafters of the 1996 Act regarding cooperative federalism, states have played a large role in regulating telecommunications through their public utility commissions over the past few decades. Through the years, state regulators have filled policy or enforcement gaps and they have supplemented the regulatory framework set forth by Congress and the FCC. The states have implemented the 1996 Act in ways that respond to intrastate, local issues such as consumer complaints, call completion, and emergency preparedness.

However, state regulators have at times used their delegated authority to handle modern problems by applying regulatory principles developed in the context of the traditional public switched telephone network. Innovation, changing consumer needs, and other factors have changed the role of the states in the regulatory scheme, and have often resulted in state challenges to federal authority and shortcomings in the cooperative federalism framework.

Today, the revolutionary transition from traditional telephone networks to IP-based networks presents a substantial challenge to the role states previously have played. The cooperative federalism framework developed to promote principles of universal service, interconnection and network reliability, consumer protection, and public safety may still be a useful guide for the regulatory approach to new networks. But the transition to IP-based networks requires that fundamental changes be made to the division of authority between federal and state governments in order to ensure the continued growth and development of the modern communications networks.

The Respective Roles of the Federal Courts, FCC, and the States Must Reflect Current Techno-functional and Marketplace Realities

The transition from traditional public switched telephone networks to digital networks has been underway for well over a decade. The FCC initiated a proceeding on the impact of IP-enabled services in 2004. Even nearly ten years ago, the Commission recognized the advantages offered, challenges posed, and regulatory implications of the rapid deployment and adoption of IP-based services. The FCC's *Notice of Proposed Rulemaking* stated:

> The Internet has … transcended historical jurisdictional boundaries … and has done so in an environment free of many of the regulatory obligations applied to traditional telecommunications services and networks … The rise of IP thus challenges the key assumptions on which communications networks, and regulation of those networks, are predicated: Packets routed across a global network with multiple access points defy jurisdictional boundaries.

The implications of the technological differences between IP-based networks and traditional telecommunications networks have been the subject of discussion and debate for years. Namely, should the states retain their current role in the cooperative federalism scheme by filling in policy and enforcement gaps in telecommunications regulation? Or, should the FCC preempt state jurisdiction, given the fundamentally interstate nature of IP-based networks and the hardship and cost of determining the geographical origination and termination of IP communications?

These issues have been litigated many times over the past decade. For instance, in the 2007 case *Minnesota Public Utility Commission v. FCC*, the 8th Circuit Court of Appeals closely examined the impact of the transition to IP-based networks. In that case, the court reviewed a challenge to an order of the FCC through which the Commission preempted

state regulation of VoIP services. In its 2004 order, *In re Vonage Holdings Corp.*, the FCC had determined that it would be impractical, if not impossible, to separate the intrastate portions of VoIP service from the interstate portions, and state regulation would conflict with federal rules and policies.

The court found that "the impossibility exception, if applicable, is dispositive of ... whether the FCC has authority to preempt state regulation of VoIP services." The "impossibility exception" of 47 U.S.C. § 152(b) allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies. The court concluded, as did the FCC, that although certain types of VoIP services may in theory be traceable, VoIP services cannot generally be separated into interstate and intrastate usage. The court stated:

> VoIP communications … differ from traditional circuit-switched telephone communications in [a] significant way. The end-to-end geographic locations of traditional landline-to-landline telephone communications are readily known, so it is easy to determine whether a particular phone call is intrastate or interstate in nature. Conversely, VoIP … communications originate and terminate at IP addresses that exist in cyberspace, but are tied to no identifiable geographic location.

Other courts examining these issues since the 8th Circuit's 2007 *Minnesota Public Utilities v. FCC* decision have agreed.

The "impossibility exception" clearly implicates cooperative federalism principles in its requirements for determining the proper division of state versus federal jurisdiction. The exception recognizes that states have a role to play, and they may not be preempted, when services are purely intrastate and no federal regulation addresses the issue at hand. But, the exception properly enables the role of federal entities in the cooperative federalism regulatory scheme by allowing preemption when a service is not clearly, exclusively intrastate and when a federal regulation or policy would be frustrated.

Although the FCC has the authority to preempt state regulation under this exception, IP-based services will likely always meet the requirements of the exception because the techno-functional characteristics of the service are fundamentally interstate and even international, requiring recognition of federal jurisdiction. The nature of the inquiry required to determine when the impossibility exception may be applied to IP-based services is too complex, time and resource-heavy to merit continued silence from the FCC on the jurisdictional issue presented. As such, the Commission should clearly declare that IP-based networks are subject to exclusively federal jurisdiction to provide regulatory certainty and to avoid unnecessary and burdensome inquiries and litigation.

The IP Transition Requires that the Commission Recognize the Fundamentally Interstate Nature of Communications Networks and Define a Supporting Role for States

The FCC has recognized that the evolution of communications networks over the past decade will require regulatory reform in order to best reflect the current technical and competitive state of the marketplace. In its stalled IP-enabled services proceeding and its ongoing IP transition proceeding, stakeholders and interested parties filed comments urging the Commission to address the jurisdictional implications of the IP transition head-on. Many commenters agreed that the Commission should declare that IP-based networks are subject to federal, not state, regulatory authority given the fundamentally interstate and international nature of such services.

Free State Foundation President Randolph May discussed the need for such reform in his testimony before the House Subcommittee on Communications and Technology in its "Evolution of Wired Communications Networks" hearing:

> The Commission should consider promptly issuing a declaratory ruling clarifying the inherently interstate status of IP-enabled services, such as VoIP. In prior orders, the Commission has recognized the benefits that result from ensuring that a truly national market exists for such services, free from layers of burdensome regulations. Unlike the old analog networks, it is more costly and less practical, if not technically infeasible, to track the jurisdictional status of IP calls for regulatory purposes. Maintenance of dual regulatory regimes, especially if the states seek to impose any form of traditional public utility regulation on IP providers, is likely to thwart the federal policy of completing the IP transition in a timely fashion. Thus, the Commission's preemption authority may be an important tool.

On November 1, the same issues were discussed in a Federalist Society teleforum entitled, "The FCC and the States: A Division of Authority," in which Free State Foundation President Randolph May participated as a panelist, along with two state public utility commissioners. The public utility commissioners seemed to agree that there is still a role for the states to play in communications regulation especially in areas of consumer protection, conflict resolution, and emergency preparedness. However, at the same time, the panelists said that there is still great ambiguity regarding the federal-state jurisdictional division regarding IP-based services, and they expressed hope that the FCC would provide clarification.

Among other industry stakeholders, CTIA also urged the Commission to affirm that IP-based services are subject to exclusively federal jurisdiction in its comments in the IP transition proceeding:

> To advance the IP transition, the Commission should affirm that IP-based services are subject to federal (and not to state) jurisdiction … Unlike traditional circuit-switched TDM networks, IP networks typically are not configured to identify the

originating or terminating point of a data packet. Frequently, users of IP-enabled services can access the service from any point on the public Internet making it impossible to determine the geographic location of the calling and called parties. In addition, IP networks may send data packets in the same communication over different, dynamically – established routes from origin to destination, confounding attempts to ascertain whether a data packet on an IP network has been transmitted on an intrastate, interstate, or international basis.

NARUC's federalism task force recognized that the revolutionary transition to IP-based networks posed new challenges regarding the shared authority of federal and state entities in its white paper, "Cooperative Federalism and Telecom in the 21st Century." The authors also stated that the states must continue to play a substantial and collaborative role in regulating communications networks regardless of the underlying technology, which would likely include a role in regulating IP-based services. The task force did suggest that "the FCC should determine the regulatory status of VoIP and other IP-enabled services," but it did not address *how* the FCC should define the jurisdiction of federal and state entities. Although the basic principles of the 1996 Act should continue to provide the foundation for the regulatory approach to communications networks, dramatic technological innovations, marketplace development, and new consumer demands require that the respective roles of the FCC and the states be updated to reflect these changes. The FCC should have exclusive economic regulatory authority over IP-based services.

Conclusion

Although there is a role for states to play in promoting intrastate communications and achieving the fundamental goals of the 1996 Act, communications utilizing IP-based networks are fundamentally interstate in nature. The basic principles of cooperative federalism and the 1996 Act should continue to provide the foundation for the regulatory approach to communications networks, but the transition to IP-based networks alters the nature of communications networks from a techno-functional standpoint relevant to jurisdictional authority. The fundamentally interstate and international operation of IP-based services renders determining the origin and destination of calls burdensome and impractical if not impossible. The transition to an all IP-based network requires that jurisdiction over IP-based networks should be subject to exclusively federal, not state, authority in order to promote regulatory certainty and to ensure the continued success of the ongoing IP-transition.

Further Readings

Randolph J. May, "Hearing on the Evolution of Wired Communications Networks," *Testimony Before the House Subcommittee on Communications and Technology* (October 23, 2013).

Randolph J. May, "Washington (DC) Should Follow Washington (State)," *FSF Blog* (July 29, 2013).

Seth L. Cooper, "High Court Case Highlights FCC's Need to Settle VoIP Status Now," *FSF Blog* (April 19, 2013).

Daniel A. Lyons, "The Challenge of VoIP to Legacy Federal and State Regulatory Regimes," *Perspectives from FSF Scholars*, Vol. 8, No. 9 (April 3, 2013).

Randolph J. May and Seth L. Cooper, "Transition from Legacy Transmission Platforms to Services Based on Internet Protocol Proceeding," *Comments* (January 28, 2013).

Randolph J. May, "Voice Over Internet Protocol Service and Internet Protocol-Enabled Service," *Testimony before the Senate Finance Committee and the House Economic Matters Committee of the Maryland General Assembly* (May 20, 2007).

Randolph J. May, "The Metaphysics of VoIP," *Perspectives*, CNET.com (January 5, 2004).