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Court Halts New York Price Controls on Broadband Internet Services: California's Net Neutrality Law Should Suffer Similar Fate

by

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On June 11, the U.S. District Court for the Eastern District of New York issued an injunction barring enforcement of a New York law imposing harmful price controls on broadband Internet access services. The court clearly grasped the implied preemptive effect of the FCC's 2018 *Restoring Internet Freedom Order* and its prohibition of state-level efforts to subject broadband services to common carrier regulation. In so doing, the court convincingly addressed a legal question left open by the D.C. Circuit in 2019 in *Mozilla v. FCC*. Importantly, the decision in *New York Times Telecommunications Association v. James* shows why a California federal court was wrong in denying injunctive relief against California's net neutrality law.

New York's Affordable Broadband Act (ABA) requires broadband Internet service providers operating in the state to offer Internet access plans for $15-per-month or $20-per-month, depending on download speeds provided. Although the law ostensibly requires the price-controlled offerings to be made only to certain lower income households, the District Court observed that it actually applies to over one-third of New York households. In granting preliminary relief from the law's enforcement, the court concluded that the price control requirements would cause broadband providers irreparable harm by decreasing revenues and by imposing new technology and advertising costs.

To comply with the law, broadband service providers would need to create eligibility verification systems and also "make all commercially reasonable efforts to promote and advertise" the state-mandated plans. Small providers alleged recurring annual revenue losses in the millions if the law is implemented. And Verizon alleged the mandatory ad campaign would cost it between $250,000 and $1 million.

As the District Court rightly recognized, "[t]he FCC's affirmative decision" in its 2018 *Restoring Internet Freedom Order* to reclassify broadband Internet as a Title I information service "is different from an abdication of jurisdiction writ large." Pursuant to that affirmative determination, the Commission may still impose regulatory obligations on the service under its Title I ancillary jurisdiction. Drawing on D.C. Circuit precedents, the District Court observed that the Communications Act confers on the Commission "various bases of jurisdiction and various tools to protect the public interest," and the agency has discretion in selecting the basis and corresponding regulatory tools to best accomplish that objective. Thus, the court wrote that choosing Title I "does not tender jurisdiction to the states to regulate interstate broadband providers as common carriers." Instead, the Commission "cement[ed] its long-standing policy choice concerning the propriety of imposing common-carrier rate regulations upon broadband internet service."

The District Court rightly concluded that New York's price control law "conflicts with the implied preemptive effect of both the FCC's 2018 Order and the Communications Act." This is because the state law "directly contravenes the FCC's determination that broadband internet 'investment,' 'innovation,' and 'availab[ility]' best obtains in a regulatory environment free of threat of common-carrier treatment, including its attendant rate regulation.

Furthermore, the District Court rightly reconciled its conclusion regarding the *implied* preemptive effect of the FCC's 2018 Order with *Mozilla v. FCC*'s rejection of Title I authority to *expressly* preempt state laws. Since no particular state law was at issue in *Mozilla*, the D.C. Circuit had no basis for conducting a conflict preemption analysis. But New York's law was put directly at issue, and the New York court recognized that "*Mozilla*'s holding does not preclude or revoke the 2018 Order's implicit preemptive effect."

Coupled with its conclusion that New York's law is conflict preempted, the District Court also rightly concluded that New York's price control mandate is field preempted. Drawing on Second Circuit precedents, the court found that federal jurisdiction over interstate communications services is "plenary" and thus occupies the entire subject – to the exclusion of the states. Yet the court observed that New York's law is not purely *intra*state: "It covers broadband internet communications from 'all Internet endpoints,' including those sent from or to endpoints outside New York State's borders." And it covers every provider engaged in interstate broadband communication that serve New York subscribers – not merely providers that operate inclusive in-state and serve only in-state subscribers. The state's attempted regulation of interstate broadband services is thus prohibited.

Significantly, the District Court's conclusions regarding federal preemption of New York's law rested on its determination that "the ABA is rate regulation" because so-called "price ceilings" regulate rates – and "rate regulation is a form of common carrier treatment."

Moreover, the decision in *New York Times Telecommunications Association v. James* presents a better understanding and application of federal legal prohibitions on state regulation of Title I broadband services than that provided in *ACA Connects v. Becerra*. In February 2021, the Eastern District of California rejected a preliminary injunction that would have barred California's SB 822 from going into effect. The California law effectively re-imposed the FCC's repealed 2015 public utility regulation at the state level, along with additional restrictions such as a general ban on sponsored and free data wireless plans. The legal challenge to California's law is now on appeal to the Ninth Circuit and likely will be argued before that court in September of this year.

On the matter of conflict preemption, New York's court was undeterred by the Eastern District of California's oral ruling in *ACA Connects*. This is because California's SB 822 did not expressly regulate how much providers can charge their subscribers. For New York's law, by contrast, the "express goal is to regulate how much providers can charge." Although that distinction was sufficient for the Eastern District of New York's purposes, its decision regarding price controls actually puts California's law in an even more negative light. A reasonable case can be made that SB 822 mandates an effective rate of zero percent when it comes to wireless providers charging Internet edge providers. And SB 822's ban on offering retail subscribers "zero-rating" wireless data plans also amounts to rate regulation. The ban on zero-rating bars wireless providers from offering subscribers access to certain apps or websites without such access counting that data traffic against subscribers' monthly data allotments and incurring extra charges.

The Eastern District of New York more forthrightly disagreed with the Eastern District of California regarding field preemption and interstate broadband services. In the New York court's view, the FCC's plenary jurisdiction over interstate communication services isn't lost "to the state's gain" just by changing the statutory title by which the agency continues its long-standing policy of nonregulation of information services. The court added:

> For that reason, this Court respectfully believes the Eastern District of California in *ACA Connects v. Becerra* has it backwards. The Communications Act does not specifically le[ave] out certain types of interstate communications [e.g., those transmitted by information services] from the FCC's jurisdiction." Becerra Tr. at 63:18–20. Rather, the Communications Act specifically leaves out certain types of jurisdiction (e.g., Title II authority to impose common carrier obligations), but not jurisdiction writ large, over interstate communications transmitted by information services.

In all, the Eastern District of New York's decision in *New York Times Telecommunications Association v. James* rightly halted enforcement of a state's misguided attempt to impose rate regulation on interstate broadband Internet services. And the decision also advances the jurisprudence regarding the implied preemptive effects of Title I reclassification and federal plenary power over interstate broadband services. The Ninth Circuit should take stock of the Eastern District of New York's sharp reasoning and conclude that California's net neutrality law also is federally preempted.

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Further Readings

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Daniel A. Lyons, "Day of Reckoning Approaches for California Net Neutrality Law," *Perspectives from FSF Scholars*, Vol. 15, No. 46 (September 9, 2020).

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