Perspectives from FSF Scholars
January 3, 2022
Vol. 17, No. 1

State-Level Price Controls on Broadband Conflict With Federal Policy: Court Should Affirm the Preemptive Force of the FCC's 2018 Order

by

Seth L. Cooper *

On December 1, 2021, twenty-two states filed a brief at the Second Circuit Court of Appeals that claimed that states have authority to regulate the price of broadband Internet services. But their defense of a New York law that controls prices for certain broadband offerings relies on the false claim that the FCC abandoned federal jurisdiction over broadband services. The Second Circuit should reject that claim, as the Commission's jurisdiction still exists.

In *New York Times Telecommunications Association v. James*, the Second Circuit should rule that the state's price control law is preempted because it conflicts with the FCC's 2018 *Restoring Internet Freedom Order*. The Commission's 2018 decision to reclassify broadband services as Title I "information services" precluded price controls and all other common carrier regulation of broadband Internet services as part of an integrated federal policy favoring market competition, FCC transparency requirements, as well as consumer protection and antitrust enforcement by the Federal Trade Commission and U.S. Department of Justice.

At issue in *James* is New York state's Affordable Broadband Act (ABA). The ABA requires broadband Internet service providers (ISPs) operating in the state to offer Internet access plans

for $15-per-month or $20-per-month, depending on the download speeds provided. The ABA would apply to ISPs' offerings to over one-third of New York households.

But on June 11, 2021, the Eastern District of New York issued an injunction that bars enforcement of the ABA. As explained in my *Perspectives from FSF Scholars*, "Court Halts New York Price Controls on Broadband Internet Services," published on June 21, 2021, the court determined that the ABA's "price ceilings" are a type of rate regulation and "rate regulation is a form of common carrier treatment." The court concluded that the ABA was preempted because it "conflicts with the implied preemptive effect of both the FCC's 2018 Order and the Communications Act," and also because federal law occupies the field of interstate communications services.

The Constitution's Article VI, Section 2 Supremacy Clause addresses what happens when federal and state laws conflict: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Under Supreme Court jurisprudence, "conflict preemption" occurs when state laws interfere with a federal objective or when it is impossible for a party to comply with both federal and state laws. And "field preemption" occurs when federal law comprehensively regulates a given "field," thereby conferring a federal right to be free from any state law requirement.

New York appealed the District Court's ruling in *James* to the Second Circuit. In a friend-of-the-court brief, twenty-two other states (and the District of Columbia) backed New York's claimed authority to impose price regulation on broadband Internet access services. They dispute the court's findings of conflict preemption and field preemption. This *Perspectives* focuses on conflict preemption issues in *James*.

According to the states allied with New York, the ABA does not conflict with the FCC's 2018 *Restoring Internet Freedom Order* because the order has no preemptive effect. Those states contend that the Commission's reclassification of broadband Internet services as "information services" under Title I of the Communications Act divested the agency of comprehensive authority – including preemptive authority – over those services. Additionally, those states contend that the FCC's Title I reclassification decision is merely a jurisdictional determination and that the Commission's "amorphous" policy objectives do not possess preemptive force.

But the Second Circuit should reject that hollowed-out view of the FCC's Title I preemptive authority. The preemptive force of the 2018 order does not rest on agency inaction or agency policy untethered to a decision made within its scope of its authority. As explained in my December 2019 *Perspectives*, "The FCC and Final Agency Action," the 2018 order is a "final agency action" that preempts contrary state laws because it was the consummation of a notice-and-comment rulemaking process and legal consequences followed from it. Supreme Court precedents, such as *Merck Sharp & Dohme Corporation v. Albrecht* (2019), recognize that preemptive effect extends to any "agency action carrying the force of law."

Under the Communications Act's Title I/Title II structure, service classification decisions are threshold determinations about the applicable regulatory regime for the defined service. The Supreme Court's 2005 decision in *Brand X Internet Services v. NCTA* recognized that such classification decisions by the FCC have significant implications for the substantive rights and

obligations of broadband ISPs: "The Act regulates telecommunications carriers, but not information-service providers, as common carriers."

Beyond relieving broadband ISPs of common carrier regulation, the FCC's 2018 order set up a positive federal policy framework to govern broadband Internet services. That framework made market competition its organizing principle and it subjected broadband ISPs to FCC transparency requirements as well as FTC and DOJ enforcement for consumer protection and antitrust. In its 2019 *Mozilla v. FCC* decision, the D.C. Circuit upheld the Commission's Title I reclassification decision. Also, the court described the transparency rule as "an essential component of the 2018 order" and upheld it under Section 257 of the Communications Act.

Moreover, the FCC based its Title I reclassification decision, in part, on "policy objectives." In its 2018 order, the Commission found that its Title I-based approach better advanced Section 230(b)(2)'s goal "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" than common carrier regulation. The Commission also expressly found that a less-regulated Title I status for broadband services was more likely to encourage broadband investment, innovation, and availability to all Americans. Indeed, the 2015 *Title II Order* and other orders making Title I classifications have invoked policy rationales.

The District Court in *James* rightly distinguished the FCC's affirmative decision not to treat broadband Internet services as common carriers from "an abdication of jurisdiction writ large." And Supreme Court precedents recognize that an affirmative federal policy favoring reduced regulation or non-regulation may have preemptive effect. The District Court relied on *Ray v. Atlantic Richfield Company* (1978), which stated that "where failure of… federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute, States are not permitted to use their police power to enact such a regulation."

Similarly, in his October 2019 *Perspectives from FSF Scholars*, "Conflict Preemption of State Net Neutrality Efforts After *Mozilla*," FSF Board of Academic Advisors member Daniel Lyons, a law professor, highlighted the application of conflict preemption in *Geier v. American Honda Motor Company* (2000). In *Geier*, a federal agency required auto makers to install only some vehicles with passive restraints like airbags. The Supreme Court found that the agency "deliberately provided the manufacturer with a range of choices among different passive restraint devices" to "bring about a mix of different devices introduced gradually over time." The court preempted, on conflict grounds, a state tort law duty to install airbags in all cars that "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."

As Professor Lyons explained, the FCC's 2018 order "represents the agency's policy judgment regarding the optimal regulatory bundle." But the New York ABA, if allowed to go into effect, would thwart a key aspect of the Commission's regulatory bundle: keeping broadband services free from traditional common carrier regulation such as price controls. State-level price ceilings on broadband services would upset what the 2018 order called the "balanced federal regulatory scheme" of market freedom and transparency requirements combined with FTC and DOJ oversight.

Accordingly, in *New York Times Telecommunications Association v. James*, the Second Circuit should affirm the District Court's conclusion that New York's Affordable Broadband Act price control law "stands as an obstacle to the FCC's accomplishment and execution of its full purposes and objectives and is conflict-preempted."

* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

Further Readings

Seth L. Cooper and Andrew K. Magloughlin, "Net Neutrality's 'Founder' Was Wrong About Broadband Markets: Competition Protects Internet Access But Big Tech Poses Realistic Harms," *Perspectives from FSF Scholars*, " Vol. 16, No. 64 (December 7, 2021).

Seth L. Cooper, *Perspectives from FSF Scholars*, "Court Halts New York Price Controls on Broadband Internet Services: California's Net Neutrality Law Should Suffer Similar Fate," Vol. 16, No. 32 (June 21, 2021).

Randolph May and Seth Cooper, "California's Net Neutrality Law Threatens Veterans' Telehealth," *Perspectives from FSF Scholars*, Vol. 16, No. 15 (March 30, 2021).

Randolph May, "A Reasonable Alternative to Internet Public Utility Regulation," *Perspectives from FSF Scholars*, Vol. 16, No.13 (March 12, 2021).

Seth Cooper, "Net Neutrality is Dead, and the Internet is Much Better Off for It," *Perspectives from FSF Scholars*, Vol. 15, No. 61 (November 18, 2020).

Seth Cooper, "The FCC Should Reaffirm Its Successful Internet Freedom Policy: Broadband Consumers Are Better Off Now Than Three Years Ago," *Perspectives from FSF Scholars*, Vol. 15, No. 55 (October 21, 2020).

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

Randolph J. May, "Don't Regulate the Internet as a Public Utility – Part II," *Perspectives from FSF Scholars*, Vol. 15, Vol. 31 (June 11, 2020).

Randolph J. May, "Don't Regulate the Internet as a Public Utility!" *Perspectives from FSF Scholars*, Vol. 15, Vol. 29 (June 3, 2020).

Theodore R. Bolema, "There's Nothing 'Anemic' About the FTC's Consumer Protection Capabilities," *Perspectives from FSF Scholars*, Vol. 15, No. 2 (January 7, 2020).

Seth L. Cooper, "The FCC and Final Agency Action: Analyzing the Implications of Justice Thomas's Conflict Preemption Principles," *Perspectives from FSF Scholars*, Vol. 14, No. 44 (December 2, 2019).

Daniel Lyons, "Conflict Preemptions of State Net Neutrality Efforts After *Mozilla*," *Perspectives from FSF Scholars*, Vol. 14, No. 29 (October 4, 2019).