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Second Circuit Preemption Decision Won't Save New York Broadband Rate Regulation Scheme

by

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I. Introduction and Summary

The Federal Communications Commission's broadband policy has taken several twists and turns in the last two decades. But under both Democratic and Republican leadership, the agency has consistently rejected broadband rate regulation. Recently, however, New York challenged this bipartisan federal policy by requiring in-state providers to offer a basic tier of service to low-income consumers at state-regulated rates.[1] Perhaps surprisingly, last month the Second Circuit Court of Appeals upheld New York's law against a preemption challenge, finding that because the *Restoring Internet Freedom (RIF) Order* classified broadband as an information service, the FCC lacked authority to regulate or deregulate broadband rates, and therefore the state program did not conflict with federal policy.[2]

The Second Circuit's decision is well-written but exhibits a narrow understanding of conflict preemption. The *RIF Order* reflected the agency's policy judgment that rate regulation and other hallmarks of the public utility model were affirmatively harmful to broadband growth and innovation. The Supreme Court has 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…states are not permitted to use their police power to enact such a regulation."[3] Because New York's law "stood as an obstacle" to the light-touch regulatory framework that the *RIF Order* "deliberately imposed" to govern the offering of broadband services, the court should have found it preempted.[4]

Fortunately, the Second Circuit's decision is, to use the court's own phrase, "not long for this world."[5] For all its faults, the FCC's recently adopted Title II order expressly "exercise[s] broad forbearance—including no rate regulation…to ensure that the regulatory environment is properly tailored to protect consumers and achieve other important public interest responsibilities while not unnecessarily stifling investment and innovation."[6] The Second Circuit recognized that a decision to forbear from applying Title II's rate regulation provisions would preempt New York's law.

As a result, the court should reconsider its decision in light of the FCC's recent action, and affirm the lower court's decision to enjoin the act. While it is an important goal to assure low-income families remain online, targeted voucher programs are a better way to meet this objective without distorting broadband markets through rate regulation in the form of price controls.

II. Analysis

New York adopted the Affordable Broadband Act in 2021. The Act requires all wireline, fixed wireless, and satellite broadband providers to offer qualifying low-income consumers a basic service plan of 25 Mbps for $15 per month, or 200 Mbps for $20 per month.[7] Like many low-income subsidy plans, a household is eligible if it is enrolled in one of a menu of other low-income assistance programs, such as the School Lunch Program, Medicaid, or state senior citizen and disability rent control programs.[8] Once every five years, broadband providers could petition the state to increase the price by the lesser of the most recent change in the consumer price index or two percent per year.[9]

This mandatory, price-controlled basic tier requirement contradicts a long-standing, bipartisan federal policy opposing broadband rate regulation. The Commission's early classification decisions were anchored in the belief that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[10] While the 2015 *Open Internet Order* moderated this directive by reclassifying broadband as a Title II common carrier service, it "expressly eschew[ed]" Title II's price control provisions.[11] The Commission stated "there will be no rate regulation"[12] and that it "cannot envision adopting new *ex ante* rate regulation of broadband Internet access service in the future."[13] The 2018 *Restoring Internet Freedom Order* repealed the 2015 order and returned broadband to Title I status in part due to concerns that "the Commission could reverse course in the future and impose a variety of costly regulations on the broadband industry—such as rate regulation," which would undermine broadband growth and investment.[14]

Despite this clear and consistent directive, the Second Circuit ruled that the Affordable Broadband Act does not conflict with federal policy because the Commission lacked authority to preempt state rate regulation.[15] This holding flowed from the *RIF Order*'s decision to classify broadband as a Title I information service. The court explained that Title II includes federal rate

regulation authority, so a decision to classify broadband under Title II but forbear from rate regulation would preempt states from imposing at the state-level obligations that the Commission eschewed at the federal level.[16] But the Second Circuit reasoned that Title I does not grant the Commission the power to regulate rates, and "[a]bsent the power to act, the FCC has no power to preempt broadband rate regulation."[17]

While superficially logical, the court's decision interprets the Supreme Court's conflict preemption caselaw too narrowly. As I have discussed at greater length elsewhere,[18] the Supremacy Clause preempts a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal government.[19] In *Geier v. American Honda Motor Co.*,[20] the Supreme Court considered a Department of Transportation regulation requiring automotive manufacturers to equip some, but not all, vehicles with airbags. The agency rejected an all-airbag standard, choosing instead to "deliberately provide[] the manufacturer with a range of choices among different passive restraint devices" designed to "bring about a mix of different devices introduced gradually over time."[21] The Court found that this regulation preempted a state tort judgment that would have found a vehicle manufacturer liable for failing to provide an airbag despite complying with the federal standard.[22] The justices ruled that the regulation reflected a decision not to exercise its full regulatory authority because providing options would facilitate innovation and improve safety overall. As a result, a state airbag requirement would conflict with federal law because it would "frustrate the accomplishment of a federal objective."[23]

Similarly, state-level rate regulation of broadband would "frustrate the accomplishment" of the *RIF Order*. In that 2018 order, the Commission could have adopted the full panoply of Title II common carrier duties, including rate regulation. But it chose the Title I regime instead, declaring that a light-touch framework backstopped by antitrust and consumer protection law was a better environment for broadband growth and innovation. The Second Circuit recognized that, had the Commission classified broadband under Title II and then chosen to forbear from rate regulation, that decision would have preempted New York's law because it would conflict with the agency's regulatory decision.[24] But, significantly, the court failed to recognize that the Commission's decision to proceed under Title I rather than Title II was an equally valid regulatory decision, informed in part by its policy judgment regarding common carriage versus an antitrust-based approach. The Commission's objective was to avoid rate regulation and other burdensome regulatory requirements – an objective frustrated by New York's law.

Fortunately for federal policy, the Second Circuit's decision had been undermined before it was even released. The day before the decision was published, the Commission adopted a new decision repealing the *RIF Order* and reinstating the 2015 Open Internet Order's Title II regime.[25] Although this decision is problematic in many ways, the Commission expressly stated that "we do not find *ex ante* or *ex post* rate regulation necessary" and thus "we find it in the public interest to forbear from applying sections 201 and 202 insofar as they would permit the adoption of such rate regulations for BIAS in the future."[26] The Second Circuit acknowledged that a Commission decision to forbear from applying Title II rate regulation would preempt the Affordable Broadband Act under traditional conflict preemption principles.[27]

Therefore, the law's challengers should immediately move for reconsideration of the court's decision in light of this intervening change in the law. If that proves unavailing, they should seek relief from the Commission and hold it to its promise that it "will not hesitate to exercise…authority" to preempt state laws that "interfere or are incompatible with the federal regulatory framework" established under the order.[28] In a paragraph added after the final vote, the order declined to expressly address any particular state program.[29] And while this passage declared that "the mere existence of a state broadband affordability program is not rate regulation,"[30] Commissioner Brendan Carr wrote separately that in his view, New York's program is "the type of naked rate regulation that is plainly preempted by today's Order."[31] And the Commissioner is correct: the Act requires providers to offer a specific plan at a price dictated by the state Department of Public Service, which constitutes "rate regulation" under any meaningful definition of the term.

III. Conclusion

New York's overall purpose is both worthy and valid. Universal service has long been a cornerstone of state and federal communications policy, and as more of our lives move online, it becomes increasingly important to ensure that low-income households are not left behind on the wrong side of the digital divide. But rate regulation is the wrong tool to address this problem. Minimum service requirements and price controls can distort investment and innovation over time, particularly in markets as dynamic as broadband service. Such distortions, ironically, risk locking low-income families into second-rate offerings.

Instead, New York should consider subsidizing low-income households through vouchers or other direct-to-consumer aid. This form of assistance improves the purchasing power of low-income households, allowing them to participate in broadband markets without distorting the operation of those markets for society more broadly. This model would allow New York to pursue its broader goals without running afoul of the federal government's long-standing, bipartisan dedication to a broadband marketplace free of problematic government price controls.

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[1] Affordable Broadband Act, N.Y. Gen. Bus. Law § 399-zzzzz.
[2] New York State Telecom. Ass'n v. James, __ F.4th __. 2024 WL 1814541 (Apr. 26, 2024).
[3] Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1978).
[4] See Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000).
[5] *New York State Telecom. Ass'n* at *7 ("The Plaintiffs' broad claim was stunning, but not long for this world.").
[6] Safeguarding and Securing the Open Internet, FCC 24-52, ¶ 6, available at https://docs.fcc.gov/public/attachments/FCC-24-52A1.pdf.
[7] N.Y. Gen. Bus. Law § 399-zzzzz.

[8] Id.
[9] Id.
[10] Inquiry re High-Speed Access to Internet Over Cable and Other Facilities, 17 FCC Rcd. 4798, 4802 (2002).
[11] Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603 (2015).
[12] Id. at 5775.
[13] Id. at 5814.
[14] Restoring Internet Freedom, 33 FCC Rcd. 311, 370 (2018).
[15] *New York State Telecom. Ass'n* at *1. The Court also found, correctly, that field preemption was inapplicable because federal law has not occupied the field in this area. Id.
[16] Id. at *14.
[17] Id.
[18] Daniel Lyons, *State Net Neutrality*, 80 U. PITT. L. REV. 905 (2019); *Conflict Preemption of State Net Neutrality Efforts After* Mozilla, PERSPECTIVES FROM FSF SCHOLARS Vol. 14, No. 29 (2019)
[19] Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[20] 529 U.S. 861, 873 (2000).
[21] Id. at 874-75.
[22] Id.
[23] Id. at 873.
[24] *New York State Telecom. Ass'n* at *14.
[25] Safeguarding and Securing the Open Internet, FCC 24-52.
[26] Id. ¶ 386.
[27] *New York State Telecom. Ass'n*, supra note 2, at *14.
[28] Safeguarding and Securing the Open Internet ¶¶ 265, 268.
[29] Id. ¶ 275.
[30] Id.
[31] Id. (Dissenting Statement of Brendan Carr).