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State Rate Regulation of Broadband Risks Regulatory Takings Violation

by

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I. Introduction and Summary

On April 30, a committee in the California Assembly will hold a hearing on proposed legislation that would dictate rates for interstate broadband information services. Intended to promote affordability, the California bill unwisely would subject broadband service providers to price controls of $15 per month. But state-level rate regulation takes away broadband providers' ability to set their prices in the free market, directly undermining their returns on investment in their network property. By substantially depriving broadband providers of the use and value of their private network property, state rate regulation raises serious constitutional questions under the Supreme Court's regulatory Takings Clause doctrine.

Doubts about the constitutionality of imposing onerous price controls on interstate broadband services that have never been rate regulated prior to 2025 should cause states to back down. Better policies exist for promoting affordable broadband Internet access. States should consider increasing state subsidies for low-income households, raising public awareness of existing affordability programs offered by broadband providers, and promoting competitive marketplace conditions that help keep prices low.

California Assembly Bill 353 would require broadband providers to offer qualifying individuals service plans with 100 Mbps or better download speeds for no more than $15 per month. Similarly, a pending Massachusetts Senate Bill would require broadband providers in that state to offer $15 or $20 per month plans. Both bills mimic New York's Affordable Broadband Act, which requires $15 and $20 per month plans. The New York law went into effect on January 15 of this year, following the Second Circuit's rejection of claims that the state's law was federally preempted.

But there are other legal grounds for challenging state rate regulation of broadband.

A reasonable case can be made that state laws that regulate rates, and thereby restrict broadband providers' ability to set prices for services in the free market, constitute an unconstitutional regulatory taking according to the three-factor test set forth by the Supreme Court in *Penn Central Transportation Company v. City of New York* (1978).

First, broadband providers likely could make showings that revenue-per-user reductions resulting from rate regulation constitute an economically impactful impairment of the value of their network property. Second, providers likely could show that state price controls interfere with distinct investment-backed expectations, being unanticipated after nearly three decades of federal policy favoring market freedom for pricing broadband information services since the Telecommunications Act of 1996. Third, the character of the government's actions appears to be one of substantial interference with preexisting property rights of network owners to set service prices in the free market, depriving them of the economic value of their property.

Notably, the Biden FCC's 2024 *Safeguarding and Securing the Open Internet Order* defended its ill-fated Title II public utility regime against regulatory Taking Clause claims largely because it did not include price controls. The order stated that "because we do not regulate [broadband] providers' ability to set market rates for the broadband Internet access services they offer end users, there is no reason to believe that our actions will deprive broadband providers of just compensation, thus fully addressing any takings claim." Additionally, the order concluded that "[b]ecause we leave [broadband] providers free to set market rates… we see no evidence that our regulatory approach 'threaten[s] an [Internet service provider's] financial integrity' and is confiscatory." Thus, a state imposing price controls on broadband would be in a less defensible position from a takings claim than the FCC was when it imposed public utility regulation in its 2024 order.

Serious doubts about the constitutionality of state rate regulation of interstate broadband services should prompt states to pursue other policies for promoting broadband affordability. Better policy options include providing or increasing state universal service support, offering direct subsidy vouchers to citizens in need, and promoting low-tax, enterprise-friendly market environments that attract new entrants and strengthen competitive pressures that keep prices low.

II. State Legislation to Rate Regulate Broadband Mimic New York Law

California Assembly Bill 353 was introduced on January 30 and amended on March 24. California AB 353 would require broadband providers to offer qualifying individuals service plans of at least 100 Mbps download speeds and "costing no more than fifteen dollars ($15) per month." Similarly, a Massachusetts Senate Bill introduced on January 15 would require broadband providers in the state to offer plans with 100 Mbps or better and 200 Mbps or better download speeds for no more than $15 per month and $20 per month, respectively.

The California and Massachusetts bills mimic New York's Affordable Broadband Act. Under the New York law, broadband providers with more than 20,000 in-state subscribers must offer low-income individuals plans of $15 per month and $20 per month. After years of litigation, the New York law finally went into effect on January 15 of this year.

Like New York law, the California and Massachusetts bills apply only to wireline, fixed wireless, and satellite broadband services. Mobile broadband services are not subject to price controls under any of those measures. The exclusion of mobile services from price controls is most likely due to the prohibition on state regulation of entry or rates for commercial mobile services and private mobile services under Section 332(C)(3)(A) of the Communications Act.

III. State Rate Regulation of Broadband Is Anti-Freedom and Counterproductive

As explained in a February 2025 *Perspectives from FSF Scholars*, "States Should Keep Broadband Internet Services Free From Price Controls," as a matter of policy, rate regulating broadband in the name of "affordability" creates more problems than it solves. State laws that restrict market freedom and hold prices below market levels discourage market entry of new providers and new technologies. Price controls upset the financially backed expectations of providers and discourage future investment in network facilities. Indeed, that *Perspectives* cited two events in January that appear to reflect the unintended consequences of price controls: AT&T announced that it intended to withdraw its emergent fixed wireless broadband offering in New York, and Starlink petitioned for an exception from the law, implying it will limit in-state service to under 20,000 subscribers.

The specter of state-level rate regulation of interstate broadband Internet access services is the surprising result of federal court rulings, most notably the Second Circuit Court of Appeals' decision in *New York State Telecommunications Association, Inc. v. James*. In *James*, the Second Circuit rejected conflict preemption and field preemption claims raised against the New York price control law. The Supreme Court twice declined to review the Second Circuit's decision.

On conflict preemption, the Second Circuit's decision in *James* expressly agreed with the D.C. Circuit's 2019 *Mozilla v. FCC* and Ninth Circuit's 2022 *ACA Connects v. Bonta* decisions that both determined the FCC has no authority under Title I. According to *Mozilla* and *Bonta*, the FCC's threshold decision to classify broadband under Title I does not constitute a source of independent preemptive authority. Instead, a Title I classification decision by the Commission effectively deprives the agency of authority to preempt state regulation of interstate broadband Internet access services under Title I. According to this reading of the law, the Commission would have possessed preemptive authority under Title II if it had classified broadband as a Title II "telecommunications service."

On field preemption, the Second Circuit's decision in *James* rejected the argument that federal law occupies the entire field of rate regulations for interstate communications services. Based on a history of states rate regulating cable TV rates and a three-judge panel's decision in *TV Pix, Inc. v. Taylor* (1986) upholding Nevada's "just and reasonable" rate requirement for community antenna TV systems, the Second Circuit "conclude[d] that there *is* a tradition of states using their police power to regulate rates charged for interstate communications services."

IV. State Rate Regulation Deviates From Federal Policy Favoring Pricing Freedom

By resorting to precedent preceding the Telecommunications Act of 1996 Act by a decade and abstracting to the general category of "communications services," the Second Circuit's upholding of the New York law in *James* nonetheless revealed that interstate broadband services are a very recent novelty. Nowhere does the 1996 Act authorize state rate regulation of information services such as broadband. Rather, Section 230(b)(2) of the Communications Act, as added by the 1996 Act, declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."

Moreover, in its implementation of the 1996 Act through the years that followed, the FCC never recognized state authority to regulate commercial mass-market retail broadband rates. Indeed, the FCC's now-vacated 2024 *Safeguarding and Securing the Open Internet Order* nowhere recognized state authority to regulate rates. In that order, the Biden FCC's majority did "find that states have a critical role to play in promoting broadband affordability and ensuring connectivity for low-income consumers," citing the federal BEAD Program. However, the Commission "decline[d] to address any particular program" in the states due to a lack of robust record and observed that "the mere existence of a state affordability program is not rate regulation."

More importantly, the 2024 Order stated that "the freedom to charge market-based end-user rates has been—and remains—a consistent part of the Commission's overall regulatory approach for [broadband Internet access service] whether under the framework of the *2015 Open Internet Order*, the *[2017 Restoring Internet Freedom] Order*, or this Order and is consistent with the Commission's strong commitment to not engage in rate regulation." Although the 2024 Order did "find that states have a critical role to play in promoting broadband affordability and ensuring connectivity for low-income consumers" and cited the BEAD Program, it "decline[d] to address any particular program" and observed that "the mere existence of a state affordability program is not rate regulation."

V. State Rate Regulation of Broadband Risks Regulatory Takings Violation

Due to the novelty and onerous nature of rate regulation, a reasonable case can be made that state laws that regulate rates, and thereby restrict broadband providers' ability to set prices for their services in the free market, constitute a regulatory taking under Supreme Court jurisprudence.

Takings claims are based on the Fifth Amendment to the Constitution, which states: "[N]or shall private property be taken for public use, without just compensation." Supreme Court precedents dating back to *Chicago, Burlington, & Quincy Railroad Company v. Chicago* (1897) hold that the terms of the Fifth Amendment's Takings Clause are incorporated against the states by the Fourteenth Amendment's Due Process Clause, which declares: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Far-reaching government restrictions on the use of private property that do not involve physical appropriation of the property are legally cognizable as regulatory takings claims.

According to *Penn Central Transportation Company v. City of New York* (1978), the existence of a regulatory taking of property requiring payment of just compensation depends on what the Court characterized as "essentially ad hoc, factual inquiries" regarding: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

These factors may be somewhat nebulous, yet persuasive arguments can be made that each of them would favor broadband providers over states imposing rate regulation. The economic impact factor, which focuses on the present-day reduction in the value of property due to the challenged regulation, apparently seldom provides a basis of support for property owners. Even so, broadband providers likely could show that revenue per user reductions resulting from rate regulation essentially constitute significant reductions of the market value of their network property.

As to the investment-based expectations factor, the lack of any state-level rate regulation of interstate broadband for 25 years following the passage of the 1996 Act as well as longstanding federal policy opposing rate regulation of broadband, would make it likely that a court would find that state rate regulation has been unanticipated by broadband providers. Given that broadband networks depend on massive up-front investment and extensive ongoing private capital expenditures, significant medium-term and long-term forecasting and investment planning are involved. Since 1996, Internet service providers have invested over $2.2 trillion in their networks. In 2023 alone, capital expenditures by fixed line and mobile providers totaled $94.7 billion and $30 billion, respectively. This tremendous growth has taken place in a regulatory environment generally characterized by free market enterprise – and devoid of any regulation of rates. But surprise rate regulation has the potential to dramatically upset broadband providers' expectancy interests.

The character factor has been described as involving an examination of the motivations behind government regulation and the extent of its interference with property rights. That factor appears to decisively favor broadband providers because price controls interfere with preexisting property rights in broadband networks in a distinctively harmful manner. The ability of an owner to set prices for services in the free market is vital to ensuring profitability and the continued existence of business enterprises. That market freedom applies no less in the case of broadband providers deciding prices for permitting access to their network property than for providers in other market industries. In other words, price controls on broadband services are so onerous that they deprive the owners of the economic value of their property, and thus are equivalent to *per se* physical takings.

VI. FCC's 2024 Order Offers Insights on Regulatory Takings and Rate Regulation

In what may be a surprise, the FCC's 2024 *Safeguarding and Securing the Open Internet Order* expressly recognized the severity of rate regulation in the regulatory takings context. In that order, the Biden FCC fended off claims that its ill-fated Title II public utility regime for broadband services constituted a regulatory taking based in large part on the fact that the agency's proffered regime did not fix rates. According to the order: "[B]ecause we do not regulate BIAS providers' ability to set market rates for the broadband Internet access services they offer end users, there is no reason to believe that our actions will deprive broadband providers of just compensation, thus fully addressing any takings claim."

Similarly, the Commission brushed back claims that its Title II public utility regime contravened "confiscatory" Takings Clause precedents applicable in the ratemaking context. The 2024 Order quoted the Supreme Court's holding in *Duquesne Light Co. v. Barasch* (1989) that "[t]he guiding principle [in the ratemaking context] has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory. . . . If the rate does not afford sufficient compensation, the [government] has taken the use of utility property without paying just compensation." In the FCC's 2024 Order, the Commission pointedly concluded that "[b]ecause we leave BIAS providers free to set market rates for the broadband Internet access services they offer end-users, we see no evidence that our regulatory approach 'threaten[s] an [Internet service provider's] financial integrity' and is confiscatory."

Thus, a state imposing price controls on broadband would be in a less defensible position from a takings claim than when the FCC adopted public utility regulation in its 2024 order. The economic impact and expectancy interests implicated by regulating network management practices such as (highly unlikely, if not non-existent) blocking and throttling are concededly indirect and more difficult to ascertain than price controls that directly restrict broadband providers from generating profits. It could at least be claimed that the Commission's doomed public utility regime was intended to prevent potential future harm – such as broadband providers blocking or throttling their subscribers (conduct that providers do not engage in and that they pledge to not do in their terms of service). But generating profits by using network property to provide valuable broadband information services is not harmful conduct. Moreover, by interfering with a provider's ability to generate a return on the use of its network property, the character of government rate controls is more sharply defined and extensive in depriving network property owners of their rights than rules against blocking or throttling the traffic of their subscribers.

VII. States Should Consider Constitutional, Market-Friendly Affordability Policies

Instead of rate regulation, states have far better means to promote broadband affordability. States can, for example, provide or increase state universal service support. Or states may offer direct subsidy vouchers to citizens in need. They also could promote low-tax, enterprise-friendly market environments that attract new entrants and thereby strengthen competitive pressures that keep prices low. Furthermore, many broadband providers offer attractive affordability programs. Those service providers are in a better position – not to mention the proper position – to ascertain the amount and extent of discounted services that their businesses can afford to offer while generating returns on investment in their network property.

Beyond the unintended bad consequences of rate regulating interstate broadband information services, serious doubts about whether such regulations violate the Supreme Court’s regulatory takings doctrine should prompt states to steer clear of price controls.

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