

Broadband Background and Current Issues



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TERMINOLOGY



- **Broadband Internet access service (BIAS)**
 - A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service. Not dial-up.
 - Wired (cable, fiber, DSL); wireless (cellular, satellite)
- **Internet service provider (ISP)**
 - A business that provides BIAS (the core infrastructure)
 - Examples include: Comcast, AT&T, Verizon, FairPoint, ECFiber, HughesNet
- **Edge provider**
 - Person that provides any content, application, or service over the Internet, or a device used to access such content, application, or service
 - Examples include: Google, Netflix, Amazon, Facebook
- **End user**
 - A person that uses BIAS
- **Data broker**
 - A business that collects and sells to one or more third parties the personal information of a consumer with whom the business does not have a direct relationship

Federal Regulatory Landscape



FCC

Federal Communications Commission

Communications Act of 1934

- Regulates interstate wire and radio communications
- Implements and administers “economic regulation” (market entry and prices)
- Some consumer protection under Title II
- Regulates radio, television, and phone industries to the extent they are “common carriers”
- Regulatory Approach
 - Rules based; bright line directives

FTC

Federal Trade Commission

Federal Trade Commission Act of 1914

- Prevents anticompetitive, deceptive, and unfair business practices
- Goal is to protect the process of competition for the benefit of consumers
- Chief federal agency on privacy policy and enforcement
- Jurisdiction over broad sectors of the economy, including the “Internet ecosystem” (edge providers, data brokers, and ISPs)
- Common carrier exclusion
- Regulatory Approach
 - Transparency (informed choices)
 - Case by case enforcement

State Regulatory Landscape



Vermont Public Utility Commission

Title 30 of the VSA

- Jurisdiction over companies offering “telecommunications service” § 203(5)

State commissions granted authority under the Communications Act. For example:

- Intrastate communications §152(b)
- Pole attachments §224(c)
- Universal service § 254(f)
- Broadband deployment and infrastructure investment § 706(a)

Vermont Attorney General

The Vermont Consumer Protection Act

- 9 VSA chapter 63

Complements the enforcement of federal law, in particular:

- The FTC Act (bans unfair methods of competition and unfair or deceptive acts or practices in commerce)
- The Sherman Act (bans monopolistic practices)

Communications Act of 1934



- Established the FCC
- The purpose of the FCC is to regulate “interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense . . .” § 151
- Communication includes telecommunications and broadcasting
- Communications technology determined to be an interstate good
- Dual jurisdiction: FCC interstate; States intrastate
- At the time, most telecommunications were intrastate
- Local phone companies were regulated monopolies

Communications Act of 1934



- The Act is divided into Titles I-VII (47 USCA chapter 5, subchapters I-VII), such as:
 - Title I – General Provisions
 - Title II – Common Carriers
 - Title III – Radio (mobile services)
 - Title IV – Procedural and Administrative Provisions
 - Title V – Penal Provisions, Forfeitures
 - Title VI – Cable Communications
 - Title VII – Miscellaneous Provisions

Telecommunications Act of 1996



- Considered to be the first major overhaul of telecommunications law
- Shift in policy to deregulation
- Let any business enter the market by removing regulatory barriers and foster competition
- The conference report refers to the bill “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced information technologies and services to all Americans by opening all telecommunications markets to competition”

Classification of Service

(Determines scope of FCC authority)



- Title I “information service” (light touch)
 - The offering of a **capability** for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. § 153(24)
- Title II “telecommunications service” (utility style)
 - The transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received. § 153(50) A provider of telecommunications service shall be treated as a common carrier under the Act. § 153(51)

“Since the advent of the Internet, the Commission has confronted the questions of whether and how it should regulate this communications network.” Verizon v. FCC (DC Cir. 2014)

Framework for Analyzing Law and Policy



- Relevant Factors, Very Generally
 - Market
 - ✦ Consolidation of infrastructure
 - ✦ Vertical integration (transmission and content)
 - Technology
 - ✦ Ever evolving and expanding capabilities
 - ✦ Ever evolving and expanding functions
 - Usage
 - ✦ Increasing reliance on Internet service
- *Findings with respect to the above factors will shape legal analysis. Provisions of the Communications Act are constantly reinterpreted.*

What is Net Neutrality?



- The principle that the company that connects you to the Internet does not get to control what you do on the Internet. Some standards include:
 - No blocking (unless constitutes reasonable network management)
 - No throttling (unless constitutes reasonable network management)
 - No paid prioritization (unless in the public interest)
 - No unreasonable interference with or disadvantaging of an end user's or edge provider's use of the Internet
 - Disclosure of network management practices and performance and commercial terms of service to promote informed consumer choices

History of Net Neutrality (A few highlights)



- **1970s – Computer Inquiries (Open Access)**
 - Confluence of computer and communications technologies
 - First net neutrality rules – sought to ensure open network platform and prevent discrimination from carrier
 - Protected “enhanced services” on the network, electronic data processing services, from anticompetitive practices of the network operator (the phone company)
- **1980 – FCC adopts Computer II regime**
 - “Basic services” (telephone service) subject to Title II regulation as common carriers
 - “Enhanced services” (involve the processing of information not just the transmission) not subject to regulation
 - Enhanced services are interstate and outside state jurisdiction
 - Transmission facilities (incumbent phone companies who offer Internet service) must be open to enhanced services providers (such as AOL) on a common carrier basis; LECs cannot bundle
- **1989 – World Wide Web invented (Tim Berners-Lee)**

History of Net Neutrality cont'd



- **1990s – Dial Up Era**

- With privatization of government funded Internet architecture, the commercial Internet is launched
- Internet service offered over telephone lines – dial up.
- Generally, end users could reach multiple ISPs over a common carrier network
- Could easily switch ISPs
- Competition promoted quality service

- **Broadband Era**

- Communications network and Internet access bundled into one service = BIAS
- Market consolidated
- Consumer choices limited

- **2005 - FCC Internet Policy Statement**

- Four guiding principles: consumers have right to access and use the lawful content, applications, and devices of their choice online and do so in an Internet ecosystem defined by competitive markets (enforced by “conditions”)

History of Net Neutrality cont'd



- **2010 FCC Open Internet Order**
 - Codified, essentially, the Internet Policy Statement
 - No blocking; no unreasonable discrimination; transparency; paid prioritization not ruled out but problematic
- **2014 – 2010 Order Struck Down**
 - Rules impose common carriage requirements on ISPs
 - Court held ISPs cannot be treated like common carriers if only offering an information service Verizon v. FCC (DC Cir. 2014)
- **2015 – FCC Open Internet Order**
 - BIAS is a “telecommunications service”
 - Upheld in USTA v. FCC (D.C. Cir. 2016); decision has been appealed
- **2017 – FCC Restoring Internet Freedom Order**

Restoring Internet Freedom Order



- Reclassifies BIAS as a Title I “information service”
 - As a result, repeals net neutrality standards in the Open Internet Order
- Preserves Transparency Rule from 2010 Open Internet Order
 - Disclosure of network management practices; and performance and commercial terms of service
- Reaffirms FCC authority to remove market entry barriers in the broadband market
 - § 257 (market entry barriers proceeding)
- Reinstates FTC enforcement of unfair, deceptive, or otherwise unlawful acts and practices of ISPs
- Establishes a “Light-touch” regulatory regime, which will:
 - Promote broadband deployment in rural America and infrastructure investment nationally
 - Promote innovation within networks and at the edge
 - Decrease the digital divide between rural and urban areas

Preemption in the Internet Freedom Order



- Order preempts state laws that:
 - Are inconsistent with the federal deregulatory approach
 - Would effectively impose requirements FCC has repealed or ***refrained from imposing*** in the order or that would impose more stringent requirements
 - Impose “economic” or “public utility-type” regulations, such as rate regulation, ban on discrimination, tariffing requirements, accounting requirement, entry and exit restrictions, interconnection obligations, and unbundling and network-access requirements. Para 191, n.701
- Order does not disturb or displace:
 - State’s traditional role in generally policing matters such as fraud, taxation, and general commercial dealings, provided they don’t interfere with federal regulatory objectives
 - Functions expressly reserved to the states under the Act, such as ETC designations; exclusive jurisdiction over poles and rights-of-way; and state universal service policies
 - Protecting consumers from fraud, enforcing fair business practices (Para. 192)

FCC's Asserted Legal Authority for Preemption



- “Impossibility exception” to state jurisdiction:
 - It is impossible or impracticable to regulate intrastate aspects of service without affecting interstate communications; and
 - The state law would interfere with federal regulatory objectives
- Independent authority in accordance with longstanding federal policy of nonregulation for information services
 - Prior to 1996, state regulation of “enhanced services” preempted
- Forbearance provision of the Act
 - States may not apply or enforce what the FCC has forborne from § 160

Challenges to Preemption Authority



- Preemption provision was not in the NPRM (procedural)
- Is it impossible or impracticable to separate intrastate and interstate components of Internet service?
 - Because of rapidly evolving technologies, prior preemption determinations are temporal in nature
 - Advances in technology, such as geographic location accuracy, may undermine prior preemption holdings. Minn. PUC v. FCC (8th Cir. 2007)
 - *Assuming it were possible, would costs and operational complexities outweigh the benefits?*

Challenges to Preemption Authority cont'd



- Does state law interfere with federal objectives?
 - What if state has a better chance of achieving federal objectives through regulation rather than nonregulation?
 - “Any state regulation of an information service conflicts with the federal policy of nonregulation.” Minn. P.U.C. v. FCC (8th Cir. 2007)
- Can federal policy be a source of preemption authority?
 - Statutory provisions establishing Congressional policy are not a grant of regulatory authority. Ancillary jurisdiction may not be grounded in policy statements alone. Comcast v. FCC (D.C. Cir. 2010) (no jurisdiction over network management policies that allegedly interfered with peer-to-peer software)
 - Nonregulation for information services refers to economic regulation not generally applicable consumer protection statutes Vonage Preemption Order
- Forbearance provision sufficient grant of authority?
 - FCC has expansive authority over a dynamic industry
 - Can the FCC technically forbear from matters it no longer has jurisdiction over?
 - When statute is ambiguous, courts apply the “clear statement rule.”

Commerce Clause (Dormant)



- “The menace of inconsistent state regulation invites analysis under the Commerce Clause of the Constitution, because that clause represented the framers’ reaction to overreaching by the individual states that might jeopardize the growth of the nation – and in particular, the national infrastructure of communications and trade – as a whole.” American Libraries Ass’n v. Pataki, 969 F. Supp. at 169
 - State law regulating speech on the Internet violated Commerce Clause because it:
 - ✦ Overreached by seeking to regulate conduct occurring outside its borders
 - ✦ Imposed burdens on interstate commerce that exceeded local benefit, and
 - ✦ Subjected interstate use of the Internet to inconsistent regulations
 - ✦ The Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.
- *Issue: Does the Vermont have a compelling state interest that outweighs the burden on interstate commerce?*

State Net Neutrality Proposals



- In general, the greater the State's interest (consumer protection, use of state land, receipt of State dollars), and the more "optional" the regulation, the less susceptible to a preemption challenge the law will be.

- (1) Require ISPs to comply with net neutrality standards, generally
 - Apply to any ISP that provides service to any person in VT
 - Use billing address as proxy for where usage occurred
 - One option is to limit the ban on paid prioritization to VT edge providers, only
 - Include a contingency effective date linked to other states enacting similar legislation
 - Is this an economic market entry barrier not permitted under § 253?
 - ✦ (a) States may not create barriers to entry for entities offering interstate or intrastate telecom service.
 - ✦ (b) Nonetheless, this doesn't interfere with state's ability to preserve and advance universal service, protect the public safety and welfare, and ensure continued quality, and safeguard the rights of consumers

- *Issue: Is it a common carrier, economic market entry regulation (and therefore preempted) or traditional consumer protection?*

State Net Neutrality Proposals cont'd



- (2) Apply net neutrality standards to pole attachments; cable line extensions; and use of State land and rights-of-way
 - States have greater authority with respect to use of its property
 - Areas of regulation traditionally reserved to the states, and left undisturbed by the Internet Freedom Order, unless the regulation interferes with federal policy
 - Pole attachments under § 224(c) (In regulating rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the attachment services, as well as the interests of the consumer of the utility)
- *Issue: Despite the State's interest, would the requirement essentially be a market-entry condition in violation of the Communications Act?*

State Net Neutrality Proposals cont'd



- (3) Make net neutrality compliance a condition of telecommunications siting under 248a.
 - 248a is an optional process for telecommunications facility siting
 - If an ISP does not want to comply with the required standards, it has another option; namely obtaining a permit under Act 250 and, if applicable, local bylaws and ordinances.
- (4) Make net neutrality compliance an eligibility requirement for receipt of public dollars in connection with the Vermont Universal Service Fund
- (5) Make net neutrality compliance a condition of receiving government contracts for Internet service
- (6) Declare that it is State policy to support net neutrality compliance

Privacy Jurisdiction (BIAS as “information service”)



- **FCC has privacy jurisdiction over common carriers**
 - § 201(b) – Bars “unjust” or “unreasonable” practices, including conduct related to data privacy
 - § 222 – Carriers must maintain confidentiality of customer proprietary network information (CPNI), unless carrier obtains customer’s consent to share
- **FTC has jurisdiction over ISPs**
 - Three core principles guide enforcement actions
 - ✦ Transparency; consumer choice; data security
 - FTC guidelines recommend “opt-in” for sensitive information
 - Unresolved – Does FTC have jurisdiction over a deceptive Internet practice if the company also offers “common carrier” (voice) service. FCC v. AT&T Mobility (9th Cir. Pending)
- **State Internet privacy law**
 - Regulates general business practices of the ISP, not its Internet service per se
 - FCC preemption is not explicit
 - Could be subject to a preemption challenge if inconsistent with federal law or policy or unduly burdens interstate commerce