BROADBAND AND THE COMMUNICATIONS ACT OF 1934

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FEDERAL COMMUNICATIONS COMMISSION (FCC)

- The FCC was established by the Act

- Independent federal agency overseen by Congress

- Responsible for implementing and enforcing communications law and policy

- Mission is "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 . . ." § 151

FCC LEADERSHIP

- The agency is directed by 5 commissioners

- Appointed by the President and confirmed by the Senate

- The President selects the chair

- Only 3 commissioners can be of the same political party at any given time

- 5-year terms

DUAL FEDERAL-STATE JURISDICTION

- Federalism (§ 152)
  - FCC has jurisdiction over interstate communications
  - States have jurisdiction over intrastate communications

- 1934 Regulatory Context
  - Telephone companies were monopolies (subject to economic regulation)
  - Most telephone service was local (intrastate)

SIGNIFICANT HISTORICAL DEVELOPMENTS

- 1980s
  - FCC Adopts *Computer II* Regime, distinguishing "basic" and "enhanced" services; state regulation of enhanced services preempted
  - 1983 first commercial mobile phone
  - 1984 – the breakup of AT&T by consent decree (result of antitrust lawsuit)
  - 1989 – World Wide Web invented (Tim Berners-Lee)

- 1990s
  - Commercial internet is launched
  - Dial-up era (internet service over regulated telephone lines)
  - 1996 – first smartphone

TELECOMMUNICATIONS ACT OF 1996

- Major overhaul of the Communications Act of 1934

- Shift in policy towards deregulation and competition

- Purpose is to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies

TELECOMMUNICATIONS ACT OF 1996 PROVISIONS

- Some significant provisions include:
  - Regulatory forbearance (§ 160)
  - Interconnection requirements (§ 251)
  - Removal of barriers to entry (§ 253 and § 257)
  - Expanded <u>universal service</u> (§ 254) and eligible telecommunications carriers (§ 214)
    - RDOF and Mapping (latter not funded by USF)
    - Lifeline
    - E-rate
    - Rural Health
  - Legal shield for social media (§ 230)
  - Privacy (§222)
  - Advanced telecommunications incentives (§706)

EMERGENCE OF BROADBAND

- Early 2000s – technology allows the signal in one line to be split between telephone and internet

- A high-speed internet connection that is always on. (Not dial up.)

- Types of broadband technology include:
  - **Wired**
    - DSL
    - Coaxial cable
    - Fiber-optic
  - **Wireless**
    - Terrestrial – mobile and fixed
    - Satellite – geostationary and low-earth orbit

REGULATORY DEFINITION OF BROADBAND

- FCC Broadband Definition
  - 2015 – Minimum speeds of 25/3 Mbps
    - Minimum speed necessary to use available applications and services
    - Metric for determining who has access to the broadband; eligibility for funding
  - 2010 – Minimum speeds of 4/1 Mbps

REGULATORY CLASSIFICATION OF BROADBAND

- Title I – "**information service**" (light-touch regulation) – **current** classification

    - 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)

    - 2018 *Restoring Internet Freedom Order – Mozilla v. FCC* (DC, 2019), not appealed to SCT

- Title II – "**telecommunications service**" (utility-style regulation)

    - 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)

    - 2015 *Open Internet Order – USTA v. FCC* (DC), cert denied 2018

WHY SO MUCH CONFUSION?

- Ambiguity and internal inconsistencies in the Act

- Dynamic factors:
  - Technological developments
  - Market trends
  - Consumer demand

- *Chevron* deference – Courts defer to agency interpretations of ambiguous terms in a law the agency administers

- Different administrations have different policies

- Compelling interests (financial; public welfare, safety, and health) = litigation

STATE JURISDICTION OVER BROADBAND

- § 253(b), concerning the removal of barriers to entry, but specifying that, "Nothing in this section shall affect the ability of a State to impose . . . requirements necessary to . . . protect the public safety and welfare . . . and safeguard the rights of consumers"

- § 254, concerning universal service, and specifying that the FCC and the States should ensure that universal service is available at rates that are just, reasonable, and affordable, including in rural or high cost areas

- *2018 Order* – "the States have a central role in policing such matters as fraud, taxation, and general commercial dealings, remedying violations on a wide variety of general state laws, and enforcing fair business practices, categories to which broadband regulation is inextricably connected."

BOUNDARIES BETWEEN STATE AND FEDERAL JURISDICTION

- **Impossibility exception** to state regulatory authority. Applies when:
  - Service has both interstate and intrastate components
  - Preemption is necessary to protect a valid regulatory objective; and
  - State regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects

- **Conflict preemption**
  - Applies to a state law that under the circumstances of the particular case stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress
  - Involves a fact-intensive inquiry

QUESTIONS?