

**BROADBAND AND  
THE COMMUNICATIONS  
ACT OF 1934, PLUS**

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FEBRUARY 20, 2021**

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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

- **1970s**
  - FCC's deregulation of customer premises equipment (CPE); e.g., modems
- **1980s**
  - FCC's *Computer II* - "basic" vs. "enhanced" services (transport vs. data/computer processing)
  - 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
  - Fiber for core network (backbone)

# 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) (*minimizes burdensome common carrier requirements*)
  - Interconnection requirements (§ 251)
  - Removal of barriers to entry (§ 253 and § 257) (*can't materially inhibit provision of services*)
  - Expanded universal service (§ 254) and eligible telecommunications carriers (§ 214)
    - High Cost Program; then CAF; then RDOF and Mapping (mapping not funded by USF)
    - Lifeline
    - E-rate
    - Rural Health
  - Legal shield for social media (§ 230)
  - Privacy (§222)
  - Advanced telecommunications incentives (§706)

# EMERGENCE OF BROADBAND – 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: (most networks mixed)
  - **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

Note: Vermont statutory goal: 100 Mbps symmetrical to all 911 locations by 2024

# 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

# CLASSIFICATION HISTORY – JURISDICTION

- In the beginning, FCC distinguishes “basic” and “enhanced”
  - State regulation of “enhanced” services preempted
- IP-enabled services considered interstate “information services”
  - State regulation preempted
- 2015 – FCC reclassifies BIAS as a “telecommunications service”
  - Inconsistent state regulations preempted (conflict preemption)
- 2018 – FCC reclassifies BIAS as an “information service”
  - Preemption Directive
- 2019 – BIAS classification upheld; Preemption Directive vacated

# WHY SO MUCH CONFUSION?

- Ambiguity and internal inconsistencies in the Act
- Dynamic (interrelated) factors:
  - Technological developments
  - Market trends (consolidation; diversification; competition)
  - Consumer demand
- Different administrations have different policies
- *Chevron* deference – Courts defer to agency interpretations of ambiguous terms in a law the agency administers (for now)
- Compelling interests (financial; public welfare, safety, and health) = litigation

# WHERE ARE WE NOW?

- Preemption Directive was to promote uniformity. (Thus, a state law is preempted if it interferes with FCC's deregulatory approach or involves any aspect of broadband service )
- Even so, the FCC stated, "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"
- Preemption Directive vacated by *Mozilla* Court in 2019 (Court held no statutory authority)
  - Reaffirms dual federal-state authority
  - States have authority over intrastate broadband regulation

# STATE BROADBAND JURISDICTION, GENERALLY

- Complementary state efforts to improve broadband data, § 1301(4)
- State initiatives to improve broadband, § 1304
- On competitively neutral basis, States can protect public safety and welfare and safeguard the rights of consumers, § 253(b)
- States can manage the public ROW and require reasonable compensation on a competitively neutral and nondiscriminatory basis, § 253(c)
- States can and should ensure that universal service is available at rates that are just, reasonable, and affordable, including in rural or high cost areas § 254(i)

Note: Many nuances here

## LEGAL QUESTION ON JURISDICTION

How do you have concurrent Federal and State jurisdiction over a service that has both an interstate and an intrastate component?

# DUAL SOVEREIGNTY - BOUNDARIES

- **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. What will happen in California?



# SOME LEGAL CONSIDERATIONS BEYOND THE ACT

- **10<sup>th</sup> Amendment**

- All powers not delegated to federal government reserved to states (federalism)
- Traditional police powers – states can regulate interstate commerce to protect the health and safety of their citizens
- Not always a clear distinction with federal government's authority over interstate commerce

- **Dormant Commerce Clause**

- State law may have practical effect of regulating beyond its borders
- *Pike* analysis – The burden on interstate commerce cannot be clearly excessive in relation to the putative local benefits

# LEGAL CONSIDERATIONS (CONT'D)

- **Market Participant Doctrine**

- Shields state action from Commerce Clause preemption even if state action affects interstate commerce
- State can act in a proprietary capacity, e.g., by acting as a buyer or seller in the market, by operating a proprietary enterprise, or by subsidizing private business
- When acting as a market participant, the government should enjoy unrestricted power to determine those with whom it will deal (*Hinesburg Sand and Gravel* – Vermont Supreme Court)
- Limits: *Cannot* have a substantial regulatory effect outside of the particular market
- *Cannot* exert a regulatory effect on a downstream market and thereby frustrate federal policies

# LEGAL CONSIDERATIONS (CONT'D)

- **5<sup>th</sup> Amendment - Takings Clause** (VT Const. has similar provision)
  - Private property cannot be taken for public use without just compensation
  - Temporary “taking” may not require compensation if it:
    - Reflects emergency measures (expanded police powers to protect public safety and health); and
    - Only causes a diminution in value (because the property will recover value as soon as the prohibition is lifted)
- **Internet Tax Freedom Act** (1998 temporary moratorium; 2016 permanent)
  - Bars state and local governments from imposing taxes on internet access
  - Applies to sale and purchase of Internet access services (no universal service charge)
  - Does not apply to fees imposed for a specific privilege, service, or benefit conferred
  - Does not apply to dedicated 911 service fees and charges “on a service used for access to 911 or E-911 services”

# GENERAL CONSIDERATIONS FOR STATE ACTION

- Is it competitively neutral?
- Is it nondiscriminatory?
- Is it consistent with FCC goals of promoting competition and innovation?
- Is it consistent with State's use of its traditional police powers and consumer protection authority?
  - The more compelling the State interest, the better
- How burdensome is the regulation?
  - The more tailored the regulation the better
  - Is it technically feasible? (e.g., ability to discriminate among intrastate and interstate traffic)
  - Is it economically reasonable? (e.g., consider the costs of compliance)
- Develop an evidentiary record

# LASTLY

- This is all subject to change

**QUESTIONS?**