

Federalist Implications of the FCC's Open Internet Order

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Introduction

Last December, the Federal Communications Commission released its much-anticipated and highly controversial *Open Internet Rules*.¹ As its primary legal justification for its actions, the Commission relied upon Section 706 of the Communications Act, which provides that “the Commission ... shall encourage the deployment of advanced telecommunications capability to all Americans” by utilizing, “in a manner consistent with the public interest, convenience and necessity”, certain “regulatory methods that remove barriers to infrastructure investment.”² However, as Section 706 applies equally to “each State Commission with regulatory jurisdiction over telecommunications services”³, the FCC’s order has introduced, perhaps inadvertently, significant questions of federalism that need to be considered.

State Deregulation versus Federal Regulation

As noted above, the FCC argues that its *Open Internet Rules* are necessary to help it fulfill its obligations under Section 706 to promote infrastructure investment. By the same token, States also have the co-equal obligation to promote infrastructure investments under Section 706. Let us assume, *arguendo*, that State A believes that the best way to fulfill its obligations under the State is to utilize “regulatory forbearance” or “other regulating methods that remove barriers to infrastructure investment” as provided for by Section 706.⁴ Clearly, such a deregulatory approach stands in stark contrast to the FCC’s approach, which

imposes, *inter alia*, significant conduct regulation on broadband service providers and presumes that contractually negotiated prices for “priority” services are unreasonable (i.e., unlawful). If the FCC’s aggressive rules turn out to lead to less infrastructure investment (as our and other’s research indicate⁵), then, by extension, the FCC’s new rules would render moot State A’s deregulatory efforts to promote infrastructure investment as required by Federal statute. In such a case, there is a plausible argument that such a conflict would give State A grounds to join any appeal of the FCC’s *Open Internet Order*.

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State Regulation versus Federal Regulation

More troubling, however, is the opposite scenario, where a State commission may use the FCC’s logic as a backdoor to reassert jurisdiction over Title I Information Services.⁶ That is to say, under the FCC’s new logic, Section 706 provides it with the ancillary authority to impose

significant regulatory burdens on how a broadband service provider may manage their network and price their services. By the same logic, then, a public utility commission in State B has equal authority to do exactly the same thing, including, by the plain terms of the statute, the imposition of “price cap regulation [and] measures that promote competition in the local telecommunications market....”

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More importantly, given the language of Section 253(a), it is unclear whether the FCC could even preempt State B from such regulatory creep. To wit, Section 253(a) provides that “No state or local statute or regulation, or State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate *telecommunications service*.”⁷ (Emphasis supplied.) Section 253(d) then goes on to provide that “If, after notice and an opportunity for public comment, the [FCC] determines that a state or local government has permitted or imposed any statute, regulation or legal requirement that violates [Section 253(a)], the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency.”⁸ However, by the FCC’s own admission, the regulated service at issue in the *Open Internet Order* is *not* a “telecommunications service” as specified in Section 253, but rather a new “broadband Internet service”, which the FCC self-defines as a “mass market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantial all Internet endpoints....”⁹

Conclusion

Of course, whether or not these theories will hold depend on the specific facts of the case and the mood of the reviewing judicial panel. Regardless, the preceding discussion raises important and legitimate questions of federalism that were clearly not contemplated fully when the FCC rushed its *Open Internet Rules* out the door.¹⁰

NOTES:

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¹ *In re Preserving the Open Internet, Broadband Industry Practices*, FCC 10-201, REPORT AND ORDER, ___ FCC Rcd ___ (rel. Dec. 23, 2010)(hereinafter “*Open Internet Order*” or “*Open Interest Rules*”).

² Section 706(a), 47 U.S.C. § 1302; *Open Internet Order*, *id.* at ¶¶ 117, 120.

³ Section 706(a).

⁴ *Id.*

⁵ See, e.g., T.R. Beard, G.S. Ford and H. Kim, *Jobs, Jobs, Jobs: Communications Policy and Employment Effects in the Information Sector*, PHOENIX CENTER POLICY BULLETIN NO. 25 (October 2010) (available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB25Final.pdf>); G.S. Ford, L.J. Spiwak and M.L. Stern, *Expanding the Digital Divide: Network Management Regulations and the Size of Providers*, PHOENIX CENTER POLICY BULLETIN NO. 23 (October 2009) (available at: <http://www.phoenix-center.org/PolicyBulletin/PCPB23Final.pdf>).

⁶ See, e.g., *Petition for Declaratory Ruling that pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, MEMORANDUM OPINION, 19 FCC Rcd 3307 (2004); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING, 17 FCC Rcd 4798, 4832, ¶ 59 (2002) (*Cable Modem Reclassification Order*), *aff’d*, *NCTA v. Brand X*, 545 U.S. 967 (2005); *Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket Nos. 02-33, 01-337, 95-20, 98-10, WC Docket Nos. 04-242, 05-271, REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING, 20 FCC Rcd 14853, 14864, 14909-11, ¶ 15, ¶ 103-04 (2005) (*Wireline Broadband Reclassification Order*), *aff’d sub nom. Time Warner Telecom, Inc. v. FCC*, 507 F.3d 205 (3rd Cir. 2007); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, DECLARATORY RULING, 22 FCC Rcd 5901, 5911, ¶ 28 (2007) (*Wireless Broadband Classification Order*); *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13288, ¶ 11 (2006)(*BPL Reclassification Order*).

⁷ 47 U.S.C. § 253(a).

⁸ 47 U.S.C. § 253(d).

⁹ *Open Internet Order*, *supra* n. 1 at ¶44.

¹⁰ See Separate Statements of Commissioners McDowell and Baker in the *Open Internet Order*, *supra* n. 1, on issues of administrative process.