THE FEDERAL TELECOMMUNICATIONS ACT OF 1996: THE STATES CONTINUE TO HAVE A ROLE

Labros E. Pilalis, MPA, JD[1]
Telecommunications Analyst
Pennsylvania Public Utility Commission

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Presentation Outline

I. THE STATES MAINTAIN A ROLE IN TELECOMMUNICATIONS REGULATION

A. **Universal Service:** The states have an important role in maintaining the evolving and redefined concept of universal service. The new concept includes retail broadband access to the Internet and associated support mechanisms both at the federal and state level (e.g., federal and state universal service fund or USF mechanisms). Following the Federal Communications Commission (FCC) November 18, 2011, *USF/ICC Transformation Order*,[2] the importance of state USF mechanisms for the support of services that are provided by wireline incumbent local exchange carriers (ILECs) with carrier of last resort (COLR) obligations — especially in high-cost rural areas — has not diminished. The state role includes the designation of eligible telecommunications carriers (ETCs) under applicable provisions of the federal Telecommunications Act of 1996 (TA-96), where designated ETCs can access various forms of support from the federal USF mechanism. Note that the FCC recently directed a major change in the ETC designation process for the providers of Lifeline retail broadband access services that will be supported through the Low Income program of the federal USF. NARUC has appealed this FCC ruling.[3]

B. **Competition, Wholesale Interconnection, and Intercarrier Compensation:** In the areas of competition, wholesale interconnection, and intercarrier compensation the states continue to play a vital role under the relevant provisions of TA-96 and applicable state law. State public utility commissions can enforce federal law and regulations consistent with their applicable state statutory mandates.[4]

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[1] **DISCLAIMER:** Mr. Pilalis is employed as a Telecommunications Analyst in the Office of Vice Chairman Andrew G. Place, Pennsylvania Public Utility Commission. The analysis and opinions expressed in this Presentation Outline are those of the author and do not express the views of the Office of Vice Chairman A. G. Place or of the Pennsylvania Public Utility Commission and its Staff.

[2] *In re Connect America Fund et al.*, WC Docket No. 10-90 *et al.*, (FCC, Rel. Nov. 18, 2011), Report and Order and Further Notice of Proposed Rulemaking, *slip op.* FCC 11-161, 26 FCC Rcd 17663 (2011), *aff'd In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied* 83 U.S.L.W. 3835, May 4, 2015 (*NARUC v. FCC*, S.Ct., No. 14-901, *Allband Com. Coop. v FCC*, S.Ct., No. 14-900) (generally *USF/ICC Transformation Order*).

[3] *In re Lifeline and Link Up Reform and Modernization et al.*, WC Docket No. 11-42 *et al.*, (FCC Rel. Apr. 27, 2016), Third Report and Order, Further Report and Order, and Order on Reconsideration, *slip op.* FCC 16-38 (FCC *Lifeline Broadband Order*), 81 Fed. Reg. 33026 (May 24, 2016), *appeal pending NARUC v. FCC*, (DC Cir. Case No. 16-1170, filed June 3, 2016).

[4] *See generally AT&T Corp. v. Core Communications Inc.*, 806 F.3d 715 (3rd Cir. 2015) (Pennsylvania Public Utility Commission jurisdiction to adjudicate intercarrier compensation dispute between competitive local exchange carriers or CLECs involving the termination of Internet service provider (ISP) traffic, application of the rate limit under the FCC's *ISP Remand Order*, and non-exclusive FCC jurisdiction as long as state action does not conflict with federal law).

C. **Reliability, Quality, and Privacy of Telecommunications Services and Physical Network Facilities:** Under the specific statutory authority mandates, states and their respective public utility commissions deal with issues relating to the reliability, quality and privacy of telecommunications services, and the related physical network facilities that provide such services. The reliable operation of physical wireline network facilities is crucial for the provision of *multiple* services — irrespective of the *jurisdictional* classification of such services — and Washington, D.C., is often "a faraway place" when it comes to dealing on a timely basis with network outages that can and do affect critical infrastructure and services, e.g., access to 911/E911 emergency services. The same holds true for a variety of issues involving consumer protection (i.e., timely adjudication of informal and/or formal complaints).

D. **Broadband Deployment:** Numerous states have various initiatives encouraging the deployment of broadband networks and services. Since retail broadband access services have become part of the universal service concept, their deployment is directly or indirectly supported by various state-specific mechanisms including USFs (e.g., even when such mechanisms were originally targeted for "revenue replacement" in the context of intrastate access charge reforms and the continuous affordability of basic local exchange telephone services). Under Sec. 706 of TA-96, both the FCC and state public utility commissions have the *joint* responsibility for the deployment of broadband networks and "advanced services." Concrete references to this *joint* responsibility are critically absent from a number of FCC rulings where Sec. 706 is discussed at length for a variety of purposes.

E. **Intrastate Regulation:** A number of states continue to regulate telecommunications public utilities and their intrastate services. Other states have substantially or totally departed from the field of public utility regulation for retail telecommunications services on the basis of statutory reforms. Such statutory reforms have also often altered the COLR obligations of ILECs in particular states. Those states that continue to exercise price regulation of intrastate telecommunications services of ILECs with COLR obligations face certain challenges because of the broad direct and indirect federal preemption that the FCC exercised through its 2011 *USF/ICC Transformation Order*. These challenges include the enforcement of the FCC mandates (i.e., intrastate and interstate switched carrier access charges for terminating traffic are moving to the "bill and keep" regime or a $0 per minute of use or MOU rate), while preserving the universal service concept through affordable local exchange telephone rates, and the use of state-specific USF mechanisms.

II. FEDERAL AND STATE INTERACTIONS

A. **Lack of Cooperative Federalism:** The FCC's repeated use of direct and/or indirect federal preemption of the states has undermined the concept of cooperative federalism in the field of telecommunications regulation.

1. **Deference of Federal Appellate Courts:** Federal appellate courts have demonstrated a continuous deference to FCC actions that involve the exercise of federal preemption, e.g., *Chevron* deference[5] and the *USF/ICC Transformation Order*. The result is that the FCC has engaged in its own interpretative "rewriting" of TA-96 and continues to do so.

See also Bohdan R. Pankiw, "2015 Summaries of PUC Court Decisions – Appellate Case Law," *Public Utility Bench Bar Conference*, (Pennsylvania Bar Institute, Mechanicsburg, PA, 2016), 69-70.

[5] *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), 104 S.Ct. 2778.

2. **Centralizing Regulatory Power at the Federal Level:** The FCC's exercise of federal preemption is increasingly centralizing regulatory power at the federal level while such matters as the redefined concept of universal service, the reliability and quality of services and physical networks, and broadband deployment remain *joint* federal-state responsibilities.

B. **Net Neutrality:** With its June 14, 2016, decision, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) upheld the FCC's March 12, 2015, *Net Neutrality Order*.[6] In all likelihood the DC Circuit Court decision will be appealed to the United States Supreme Court. However, the FCC *Net Neutrality Order* and the DC Circuit Court decision have certain implications and potential areas of concern:

1. **Reclassification of Broadband Retail Access as Telecommunications:** The DC Circuit Court affirmed the FCC's reclassification of "both fixed and mobile 'broadband Internet access service [BIAS]' as *telecommunications services*."[7] The FCC "defined 'broadband Internet access service' as '*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, but excluding dial-up Internet access service'."[8] The DC Circuit Court reviewed the FCC's prior "shifting regulatory treatment" — a rather long and tortured one at that — of retail broadband access as "information services."[9] However, the Court was conclusively persuaded by the FCC's explanation:

> [T]hat "[u]sers rely on broadband Internet access service to transmit 'information of the user's choosing,' 'between or among points specified by the user ,'" *without changing the form or content of that information.*

DC Circuit Decision, at 27, citing FCC *Net Neutrality Order*, ¶ 361 (emphasis added).

Essentially, retail broadband access services or BIAS have been brought within the framework of common carrier telecommunications services, a regulatory outcome that was long overdue.

2. **FCC Open Internet – Net Neutrality Rules:** The DC Circuit Court upheld the FCC's anti-blocking, anti-throttling, anti-paid-prioritization, general conduct, and enhanced transparency rules and associated safeguards.[10]

3. **FCC Forbearance:** Contrary to the popular press reports, the DC Circuit Court's affirmation of the FCC *Net Neutrality Order* does ***not*** allegedly transform BIAS into "public utility services." The FCC exercised considerable forbearance in its *Net*

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[6] *In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, (FCC, rel. Mar. 12, 2015), Report and Order on Remand, Declaratory Ruling, and Order, *slip op.* FCC 15-24, 30 FCC Rcd. 5601 (2015) (FCC *Net Neutrality Order*), *aff'd United States Telecom Assoc., et al. v. FCC*, (DC Cir., No. 15-1063 *et al.*, June 14, 2016, *slip op.* https://www.cadc.uscourts.gov/internet/opinions.nsf/3F95E49183E6F8AF85257FD200505A3A/$file/15-1063-1619173.pdf (DC Circuit Decision).

[7] DC Circuit Decision, at 20, citing FCC *Net Neutrality Order* ¶ 331 (emphasis added).

[8] DC Circuit Decision, at 20, citing FCC *Net Neutrality Order* ¶ 336 (emphasis added).

[9] DC Circuit Decision, at 13-16, 49 (citations omitted).

[10] DC Circuit Decision, at 21 (citations omitted).

Neutrality Order from various provisions of TA-96, and the Court upheld the FCC actions. At most, the FCC's adopted regulatory regime can be characterized as "common carrier regulation *light*." The FCC's forbearance actions create some potentially interesting repercussions that may also implicate the state public utility commissions.

a. The FCC *Net Neutrality Order* forbears from the requirements of Sec. 251 and 252 of TA-96, 47 U.S.C. §§ 251 and 252, and the DC Circuit Court affirmed the FCC actions.[11] As it is rather well known, Sec. 251 and 252 govern wholesale interconnection obligations between telecommunications carriers and the formulation of relevant interconnection agreements that are usually subject to the review and approval of state public utility commissions, along with certain network unbundling obligations for ILECs. Although the FCC's *Net Neutrality Order* is designed to avoid a conflict with past FCC directives regarding the unbundling of ILEC retail broadband access network facilities and services (e.g., fiber to the home or FTTH),[12] the question remains whether the future application of Sec. 251 and 252 remains undisturbed on issues of wholesale interconnection.

b. The concurring in part and dissenting in part opinion of Senior Circuit Judge Williams pointed out that there is an inconsistency "where it [the FCC] seeks to apply Title II to broadband internet providers while forbearing from the vast majority of Title II's statutory requirements."[13] Judge Williams pointed out that there was a need for a competitive market power analysis before the FCC could reach its forbearance conclusions.[14]

4. **Effects on Federal and State USF Mechanisms:** The FCC *Net Neutrality Order* has affected the ongoing reform efforts of the federal USF contribution base and methodology, and may impact the operation of state USF mechanisms.

a. The Federal USF Contribution Mechanism: The FCC *Net Neutrality Order* preserves the *status quo* through the exercise of federal forbearance when it comes to the Section 254(d), 47 U.S.C. § 254(d), for any **new** contribution assessments for the federal USF that would involve broadband Internet access services (BIAS).[15] At the same time, the FCC *Net Neutrality Order* acknowledges the separate referral to the Joint Board regarding the reform of the federal USF contribution base and methodology, and preserves the relevant issues for further examination in the context of this referral.[16]

b. The FCC *Net Neutrality Order* and State USF Mechanisms**:** The FCC *Net Neutrality Order* presents additional challenges for state USF mechanisms. These challenges hopefully will be substantively addressed in the future recommendation that will be made by the Joint Board on the reforms of the federal USF contribution base. Some of these challenges include:

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[11] DC Circuit Decision, at 85-94 (addressing the relevant appeal of Full Service Network, a CLEC).
[12] FCC *Net Neutrality Order*, ¶ 514 and n. 1582, *slip op.* at 252.
[13] DC Circuit Decision, at 177 (concurrence-dissent, at 62).
[14] DC Circuit Decision, at 180-181 (concurrence-dissent, at 65-66).
[15] FCC *Net Neutrality Order*, ¶ 488, at 235 (citations omitted). *See also* Presentation of Commissioner James H. Cawley, Pennsylvania Public Utility Commission, WTA Spring Meeting, Palm Springs, California, May 4, 2016.
[16] *Id.*, ¶ 489, *slip op.* at 235-236, and n. 1471 at 236.

(1) BIAS is classified as jurisdictionally *interstate* for regulatory purposes while also acknowledging that BIAS " '…may include an intrastate component…'."[17]

(2) The States are bound by the Net Neutrality Order forbearance directives.[18]

(3) The FCC *Net Neutrality Order* provides for a potential future reexamination for the role of state USFs and the newly reclassified BIAS services. However, for the time being the Order concludes "that any state requirements to contribute to state universal service support mechanisms that might be imposed on such broadband Internet access services would be inconsistent with federal policy and therefore are ***preempted*** by section 254(f) — at least until such time as the Commission [FCC] rules on whether to require federal universal service contributions by providers of broadband Internet access service."[19]

C. **Lifeline Reform and Lifeline Broadband:** The recently issued FCC *Lifeline Broadband Order* centralizes the process for ETC designations of Lifeline broadband providers (LBPs) at the FCC. Furthermore, the FCC finds "that state designations for this new LBP ETC designation would *thwart federal universal service goals and broadband competition*, and accordingly ***preempt*** such designations."[20] These FCC actions appear to be totally inconsistent with the statutory mandates in Sec. 214(e) of TA-96, 47 U.S.C. § 214(e), under which the states have traditionally performed the function of ETC designations *irrespective* of the jurisdictional nature of the services offered by wireline and wireless Lifeline service providers. At the same time, a number of states have actively policed the ETC process and the provision of Lifeline services at their own expense (e.g., construction of cross-checking data bases), well before the February 2012 FCC reforms in the Low Income program of the federal USF mechanism. Not surprisingly, NARUC has appealed the FCC *Lifeline Broadband Order* to the DC Circuit Court. The FCC *Lifeline Broadband Order* is interjecting a new degree of uncertainty in the division of the state and federal regulatory oversight roles over Lifeline services that will now include BIAS, where such services will be supported from the Low Income program of the federal USF mechanism.

III. A RENEWED EMPHASIS ON COOPERATIVE FEDERALISM

A. **A Cooperative Federalism Partnership:** There must be a "balance between complete federal preemption and 'uncoordinated federal and state action in distinct regulatory spheres (dual federalism)'."[21] Similarly, there must be a renewed emphasis on meeting the parameters of the cooperative federalism concept.

B. **A Change In the Federal Process Is Necessary:** There are needed changes both in the FCC decision making processes and in the appellate court review of admittedly complex FCC decisions with major national impacts. Due process requirements and the opportunity to meaningfully participate cannot be simply met through the application of the "permit but

[17] *Id*, ¶ 431, *slip op*. at 203 (citations omitted).
[18] *Id*, ¶ 432, *slip op*. at 203, citing 47 U.S.C. § 160(c), n. 1281.
[19] *Id.*, n. 1477, *slip op.* at 237 (emphasis added, citing 47 U.S.C. § 254(f): "A State may adopt regulations not inconsistent with the Commission's [FCC's] rules to preserve and advance universal service").
[20] FCC *Lifeline Broadband Order*, ¶ 229, *slip op.* at 83. *Id.*, ¶ 232, and n. 616, at 83-84.
[21] *NARUC Federalism Task Force Report: Cooperative Federalism and Telecom In the 21st Century*, (NARUC, Washington, D.C., Sept. 2013), at 7, citing Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L.Rev. 1692, 1697 (2001).

disclose" electronic posting of ex parte submissions, communications, and personal meetings with FCC Commissioners and staff. Similarly, FCC decisions need to be scrutinized more carefully by the federal appellate courts and not merely accorded *Chevron* deference.