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STATES AND ISP COMMON-CARRIER REQUIREMENTS: A TALE OF TWO COURTS

by Robert W. Quinn

For ISPs, the FCC's 2018 Restoring Internet Freedom Order (the RIF order), which removed the Title II common carrier designation applied to Broadband Internet Access Service (BIAS), constituted—in the words of Charles Dickens—"the best of times" and "the worst of times." For no sooner than the FCC had lifted the federal burden of common carriage rules for the provision of BIAS, the states moved in and enacted rules to reimpose common carriage requirements on those same services.¹ The judicial issue at the centerpiece of the litigation on these laws is whether the FCC's RIF Order preempted the states from enacting and enforcing laws and rules regulating the internet. Two early federal District Court decisions—one from California and one from New York—frame the core preemption issues.²

The issue of net neutrality is already well documented, so I won't go into that at any great length here. It suffices to say that prior to 2015, the FCC had twice unsuccessfully tried to enact or enforce prohibitions against blocking and throttling of internet services under Title I of the Communications Act of 1934, only to have those efforts rejected by the U.S. Court of Appeals for the D.C. Circuit. In 2015, a Democratic FCC declared that BIAS was not an "information service" under the Act, but rather a Title II common carriage service (while ultimately forbearing from many provisions of Title II), imposed rules similar to the ones previously rejected, and largely preempted the states from enacting additional requirements. For the first time, the FCC's net neutrality Order was affirmed by the D.C. Circuit, which heavily emphasized the agency's broad latitude to interpret the Communications Act's provisions and recognized that the Supreme Court had previously endorsed the FCC's 2002 decision that BIAS was *not* a Title II common carriage service.

¹ Three states (California, Vermont, and Washington) enacted laws essentially reinstating the Title II rules in place prior to the RIF Order, either across-the-board or for ISPs seeking to sell service to state government entities. In addition, ten states enacted laws or issued Executive orders requiring that ISPs comply with pre-RIF Order rules to obtain access to certain public monies or contracts (Colorado, Hawaii, Maine, Montana, New Jersey, New York, Oregon, Rhode Island, and Vermont). The California and Vermont laws were stayed pending resolution of the RIF Order appeals. The RIF Order was affirmed by the D.C. Circuit last year, restarting the litigation around the state laws.

² These early decisions have been raised in the context of ISPs seeking preliminary injunctive relief staying the application of these state laws. As such, the substantive discussion around preemption is a discussion of whether plaintiffs have a likelihood of success on the merits and is not dispositive on the underlying litigation. Both cases are still at the trial stage level. In California, the denial of the preliminary injunction is currently on appeal in *American Cable Assoc. v. Becerra*, (Ninth Cir., Case No. 21-15430). *N.Y. State Telecommunications Assoc. v. James*, (E.D.N.Y., Case No. 2:21-cv-2389) is still pending and the appeal period on the grant of preliminary injunction has not yet expired.

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In 2018, after Republicans took control of the agency, the FCC issued the RIF Order reclassifying broadband internet access service as a Title I information service. The FCC also repealed most of the 2015 rules (leaving intact a slimmed down transparency requirement which, *inter alia*, required BIAS providers to disclose publicly any blocking or throttling of traffic). In reclassifying the service, the FCC specifically found that common carriage regulation depressed network investment incentives, in theory and in fact, and proclaimed that it was adopting a light-touch regulatory framework that would restore those incentives. In addition, the FCC proactively preempted states from imposing similar common carriage-style regulations. On appeal, the D.C. Circuit largely affirmed the FCC's decision but reversed its blanket preemption finding while leaving open the prospect that the FCC or aggrieved parties might raise conflict preemption claims of state laws on a case-by-case basis.

Shortly after the FCC acted, California enacted a state law that largely reinstated the repealed rules. New York, on the other hand, near the height of the pandemic, enacted laws to require ISPs to provide BIAS service to low-income households at rates prescribed in the legislation. Both laws flew in the face of the FCC's conclusion in the RIF Order to free BIAS from state-imposed common carriage regulation. The broadband providers filed lawsuits challenging both laws and sought preliminary injunctions to keep them from taking effect.

Because the ISPs were seeking injunctive relief, both courts used a four-pronged test to determine whether injunctive relief should issue: this well-worn test considers whether (1) the plaintiff is likely to succeed on the merits; (2) the plaintiff will suffer irreparable harm if not granted the relief; (3) the balance of equities tip in the plaintiff's favor and (4) the injunction serves the public interest. For our purposes, the most interesting aspect of these cases centers on the first prong: will the ISPs likely prevail on their assertion that the RIF Order preempted states from imposing common carriage regulation?

In both cases, the ISPs argued that, while the D.C. Circuit struck down the FCC Order's blanket preemption, the court preserved the ISPs' ability to seek conflict preemption. Analyzing the RIF Order in that context, accordingly, the ISPs made two arguments. First, the state laws conflict with the Communications Act of 1934 (the Act) by standing as an obstacle to the accomplishment and execution of the full purpose and objective of Congress (as interpreted by the FCC) (conflict preemption). Second, that the states had invaded a field of regulation entirely occupied by federal law (field preemption).

In support of conflict preemption, the ISPs argued that both the California and New York laws would impermissibly impose common carriage regulation in violation of the Act (which prohibits common carriage on interstate information services). In addition, the ISPs argued that the FCC made a conscious decision to relieve BIAS services of common carriage regulation to incent broadband investment. Thus, both statutes stood as obstacles to accomplishment of the FCC's objectives.

In support of field preemption, the ISPs argued that under the Act, the federal framework occupied the field for the regulation of all interstate services, including interstate information services like BIAS. Further, the ISPs argued that the Act specifically allocated federal authority on the regulation for *interstate* services to the FCC. The States, on the other hand, were limited under the Act to regulating *intrastate* services. Because BIAS was defined as an interstate information service by the FCC—indeed, even the decisions imposing net neutrality rules acknowledged that BIAS was an interstate offering—the federal regime prevailed, and the states were preempted from imposing contrary common carriage requirements.

The federal district courts in California and New York came out at opposite ends of the spectrum on these arguments. In *ACA Connects*,³ Judge Mendez rejected both of the ISP arguments for

³ *American Cable Association v. Becerra*, Case No. 18-CV-2684 (Tr. Order dated Feb. 23, 2021) (Judge Mendez).

preemption of the California statute. On the issue of conflict preemption, Judge Mendez contended that the RIF Order simply reinterpreted broadband to an information service and therefore placed the service “outside of the FCC’s regulatory ambit.” (Tr. Order At 65) Consequently, he found that that RIF Order was a decision that the agency lacked authority to regulate in the first instance rather than an affirmative act of deregulation and that therefore the “deregulatory purposes” behind that decision have no preemptive effect. Consequently, he held, the plaintiff ISPs were unlikely to succeed on the merits at trial. (Tr. Order at 66).

On the issue of field preemption, Judge Mendez disagreed with the ISPs’ argument that the Act so clearly delineated authority between federal and state regulators. Indeed, the court stated that the Act itself is silent on state authority to regulate interstate services, pointing out that the statute only expressly limits the FCC to regulation of interstate services, and even then, only of a specific subset of interstate services (telecommunications services). (Tr. Order At 63). In rejecting the argument for field preemption, the court observed that if “Congress had intended to preclude both state and federal regulation, it presumably would have said so clearly, as it did elsewhere in the Act.” (Tr. Order At 64). Consequently, Judge Mendez found that the ISPs did not reach their burden on the field preemption claims as well.

In *NY State Telecommunications Assoc.*,⁴ Judge Hurley reached the opposite conclusion on both issues. As to conflict preemption, Judge Hurley rejected outright the contention that “the FCC disclaimed its authority to regulate broadband,” (Op. at 17) pointing to the FCC’s statement that it was purposefully choosing, in part on *policy* grounds, not to regulate broadband as common carriage. According to the court, that action “did not tender jurisdiction to the states to regulate interstate broadband providers as common carriers” (Op. at 19), and the New York law therefore stands as an “obstacle to accomplishment and execution of the FCC’s reasoned decision” to exempt BIAS from common carriage regulation. Thus, the ISPs were likely to succeed on the merits of their underlying claim.

The court likewise found that the ISPs were likely to succeed on the merits of the field preemption issue as well, noting that “[b]inding Second Circuit law holds that the Communication Act’s broad scheme for the regulation of interstate services...indicates an intent on the part of Congress to occupy the field to the exclusion of state laws.” (Op. at 27 citing *Ivy Broadcasting v. AT&T Co.*, 391 F. 2d 486, 490-91 (2d Cir. 1968). Interestingly, the New York AG’s office had cited the discussion from the *ACA Connects* decision in California discussed above on field preemption. Judge Hurley expressly rejected Judge Mendez’s logic on that issue, noting that he found it hard to square that decision with the Supreme Court’s decision in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 360 (1986). That case, he observed, “described the Communications Act as dividing communications services into ‘two hemispheres – one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the states would retain exclusive jurisdiction.”

We now have two courts at opposite ends of the country coming to vastly different conclusions around the issue of whether the FCC by not regulating an interstate broadband service can effectively preempt states from regulating that same internet service. In addition, both courts disagree on the fundamental issue of whether the Communications Act limits states to regulating *only* intrastate services. It is obviously too early to call a circuit split on these issues (we don’t even have decisive District Court decisions on the merits yet), but both cases will be bear watching as they wend their way through the federal judicial system.

⁴ *New York State Telecommunications Assoc. v. James*, Case No. 2:21-cv-2389 (E.D. N.Y. June 11, 2021) (Judge Hurley).