7. Preemption of Inconsistent State and Local Regulations

194. We conclude that regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements. Our order today establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals of the 1996 Act. Allowing state and local governments to adopt their own separate requirements, which could impose far greater burdens than the federal regulatory regime, could significantly disrupt the balance we strike here. Federal courts have uniformly held that an affirmative federal policy of *de*regulation is entitled to the same preemptive effect as a federal policy of regulation.[726] In addition, allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates.[727] Just as the *Title II Order* promised to "exercise our preemption authority to preclude states from imposing

[726] *Cf., e.g.*, *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 383 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."); *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 774 (1947) (state regulation precluded "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute"); *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580-81 (8th Cir. 2007) (*Minn. PUC*) ("[D]eregulation" is a "valid federal interest[] the FCC may protect through preemption of state regulation.").

[727] *Cf. Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22427, para. 37 (2004) (*Vonage Order*) ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations"); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3323, para. 25 (2004) (*Pulver Order*) ("[I]f Pulver were subject to state regulation, it would have to satisfy the requirements of more than 50 states and other jurisdictions"). Many commenters express concern that allowing every state and local government to impose separate regulatory requirements on ISPs would create a patchwork of inconsistent rules that may conflict with one another or with federal regulatory objectives, and that this would impose an undue burden on ISPs that could inhibit broadband investment and deployment and would increase costs for consumers. *See, e.g.*, Cox Comments at 35 (ISPs "rel[y] on . . . uniform national policies to provide service on a consistent basis across [their] footprint without being subject to a patchwork of inconsistent state regulation"); CTIA Comments at 55-56 ("A patchwork quilt of state regulation of the Internet would be unworkable and deeply harmful to consumer interests."); NCTA Comments at 64, 67 (arguing that "inconsistent state regulation undermines 'the efficient utilization and full exploitation' of Internet services" and that ISPs "would be forced to comply with a patchwork of overlapping and potentially conflicting obligations absent federal preemption"); T-Mobile Comments at 26 ("A patchwork quilt of state-by-state regulation would impair providers' ability to offer nationwide service plans and to engage in uniform practices, undermining consumer welfare. It adds operational and financial burdens without corresponding benefit."); WIA Comments at 10 n.39 ("[A] patchwork of state and local requirements . . . can reduce carriers' incentives to invest and hamper their ability to make large scale deployments."); CTIA Reply at 20 ("[Permitting state regulation] will result in obligations that differ in their particulars from those imposed by the federal government or other states. The resulting patchwork will either balkanize a service provider's offerings or force the provider to conform all its offerings to the requirements of the most stringent state."); Verizon Reply at 16 ("[T]he substantial burdens of piecemeal regulation by states would frustrate the federal policy to promote broadband development through light-touch, federal regulation."); Letter from Anand Vadapalli, President & CEO, Alaska Communications Systems, et al., to The Honorable Ajit Pai, Chairman, The Honorable Mignon Clyburn, Commissioner, The Honorable Michael O'Rielly, Commissioner, FCC, WC Docket No. 17-108, at 2 (filed Nov. 17, 2017) (Letter from Rural ISPs) ("[I]t is important that states and localities not be allowed to impose common carrier-like regulations, including economic regulations, on broadband providers."); McDowell Tesimony at 12-15. *see also* Letter from William H. Johnson, Senior Vice President Federal Regulatory and Legal Affairs, Verizon, to Marlene Dortch, Secretary, FCC, at 11 (filed Oct. 25, 2017) ("The possibility of 50 different sets of rules . . . would impose costly requirements, hamstring technological innovations, and create severe regulatory uncertainty; these costs would inevitably hinder investment in broadband Internet.") (Verizon FCC Preemption White Paper).

regulations on broadband service that are inconsistent" with the federal regulatory scheme, we conclude that we should exercise our authority to preempt any state or local requirements that are inconsistent with the federal deregulatory approach we adopt today.[728]

195. We therefore preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.[729] Among other things, we thereby preempt any so-called "economic" or "public utility-type" regulations,[730] including common-carriage requirements akin to those found in Title II of the Act and its implementing rules, as well as other rules or requirements that we repeal or refrain from imposing today because they could pose an obstacle to or place an undue burden on the provision of broadband Internet access service and conflict with the deregulatory approach we adopt today.[731]

196. Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, we do not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives.[732] Indeed, the continued

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[728] *See Title II Order*, 30 FCC Rcd at 5804, para. 433.

[729] This includes any state laws that would require the disclosure of broadband Internet access service performance information, commercial terms, or network management practices in any way inconsistent with the transparency rule we adopt herein. Our transparency rule is carefully calibrated to reflect the information that consumers, entrepreneurs, small businesses, and the Commission needs to ensure a functioning market for broadband Internet access services and to ensure the Commission has sufficient information to identify market-entry barriers—all without unduly burdening ISPs with disclosure requirements that would raise the cost of service or otherwise deter innovation within the network.

[730] The terms "economic regulation" and "public utility-type regulation," as used here, are terms of art that the Commission has used to include, among other things, requirements that all rates and practices be just and reasonable; prohibitions on unjust or unreasonable discrimination; tariffing requirements; accounting requirements; entry and exit restrictions; interconnection obligations; and unbundling or network-access requirements. *See, e.g.*, *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4911-13, paras. 73-74 (2004) (*IP-Enabled Services NPRM*); *Policy and Rules Concerning Rates for Dominant Carriers*, Notice of Proposed Rulemaking, 2 FCC Rcd 5208, 5222, para. 4 n.5 (1987); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 525, para. 19 (1981).

[731] We are not persuaded that preemption is contrary to section 706(a) of the 1996 Act, 47 U.S.C. § 1302(a), insofar as that provision directs state commissions (as well as this Commission) to promote the deployment of advanced telecommunications capability. *See, e.g.*, NARUC Comments at 2; Public Knowledge Reply at 27. For one thing, as discussed *infra*, we conclude that section 706 does not constitute an affirmative grant of regulatory authority, but instead simply provides guidance to this Commission and the state commissions on how to use any authority conferred by other provisions of federal and state law. *See infra* Part IV.B.3.a. For another, nothing in this order forecloses state regulatory commissions from promoting the goals set forth in section 706(a) through measures that we do not preempt here, such as by promoting access to rights-of-way under state law, encouraging broadband investment and deployment through state tax policy, and administering other generally applicable state laws. Finally, insofar as we conclude that section 706's goals of encouraging broadband deployment and removing barriers to infrastructure investment are best served by preempting state regulation, we find that section 706 *supports* (rather than prohibits) the use of preemption here.

[732] *Cf. Vonage Order*, 19 FCC Rcd at 22405, para. 1; *see also National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC Rcd 5051, 5054, para. 9 (2010) (*NARUC Broadband Data Order*) ("Classifying broadband Internet access service as an information service . . . does not by itself preclude" all state measures, such as "[s]tate data-gathering efforts" that do not impose an undue burden or conflict with any federal policy, particularly where the Broadband Data Improvement Act acknowledged such state data collection). We thus conclude that our preemption determination is not contrary to section 414 of the Act,

(continued….)