Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108

DECLARATORY RULING, REPORT AND ORDER, AND ORDER

Adopted: December 14, 2017 **Released: January 4, 2018**

By the Commission: Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioners Clyburn and Rosenworcel dissenting and issuing separate statements.

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I. INTRODUCTION

1. Over twenty years ago, in the Telecommunications Act of 1996, President Clinton and a Republican Congress established the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation."[1] Today, we honor that bipartisan commitment to a free and open Internet by rejecting government control of the Internet. We reverse the Commission's abrupt shift two years ago to heavy-handed utility-style regulation of broadband Internet access service and return to the light-touch framework under which a free and open Internet underwent rapid and unprecedented growth for almost two decades. We eliminate burdensome regulation that stifles innovation and deters investment, and empower Americans to choose the broadband Internet access service that best fits their needs.

2. We take several actions in this Order to restore Internet freedom. First, we end utility-style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom. In the 2015 *Title II Order*, the Commission abandoned almost twenty years of precedent and reclassified broadband Internet access service as a telecommunications service subject to myriad regulatory obligations under Title II of the Communications Act of 1934, as amended (the Act).[2] We reverse this misguided and legally flawed approach and restore broadband Internet access service to its Title I information service classification. We find that reclassification as an information service best comports with the text and structure of the Act, Commission precedent, and our policy objectives. We thus return to the approach to broadband Internet access service affirmed as reasonable by the U.S. Supreme Court.[3] We also reinstate the private mobile service classification of mobile broadband Internet access service and return to the Commission's definition of "interconnected service" that existed prior to 2015. We determine that this light-touch information service framework will promote investment and innovation better than applying costly and restrictive laws of a bygone era to broadband Internet access service. Our balanced approach also restores the authority of the nation's most experienced cop on the privacy beat—the Federal Trade Commission—to police the privacy practices of Internet Service Providers (ISPs).

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[1] 47 U.S.C. § 230(b)(2). *See generally* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) (1996 Act).

[2] *See Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

[3] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (*Brand X*).

3. Next, we require ISPs to be transparent. Disclosure of network management practices, performance, and commercial terms of service is important for Internet freedom because it helps consumers choose what works best for them and enables entrepreneurs and other small businesses to get technical information needed to innovate. Individual consumers, not the government, decide what Internet access service best meets their individualized needs. We return to the transparency rule the Commission adopted in 2010[4] with certain limited modifications to promote additional transparency, and we eliminate certain reporting requirements adopted in the *Title II Order* that we find to be unnecessary and unduly burdensome.

4. Finally, we eliminate the Commission's conduct rules. The record evidence, including our cost-benefit analysis, demonstrates that the costs of these rules to innovation and investment outweigh any benefits they may have. In addition, we have not identified any sources of legal authority that could justify the comprehensive conduct rules governing ISPs adopted in the *Title II Order*. Lastly, we find that the conduct rules are unnecessary because the transparency requirement we adopt, together with antitrust and consumer protection laws, ensures that consumers have means to take remedial action if an ISP engages in behavior inconsistent with an open Internet.

5. Through these actions, we advance our critical work to promote broadband deployment in rural America and infrastructure investment throughout the nation, brighten the future of innovation both within networks and at their edge, and move closer to the goal of eliminating the digital divide.

II. BACKGROUND

6. Since long before the commercialization of the Internet, federal law has drawn a line between the more heavily-regulated common carrier services like traditional telephone service and more lightly-regulated services that offer more than mere transmission. More than fifty years ago, the Commission decided *Computer I*, the first of a series of decisions known as the *Computer Inquiries*,[5] which, in combination, created a dichotomy between "basic" and "enhanced" services.[6] In 1980's *Second Computer Inquiry*, the Commission established that basic services offered "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information"[7] and were "regulated under Title II of the [Communications] Act."[8] Enhanced services, by contrast, were "any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information."[9] Unlike basic services, the Commission found that "enhanced services should not be regulated under the Act."[10]

7. Just two years later, the federal courts would draw a similar line in resolving the government's antitrust case against AT&T. The Modification of Final Judgment (MFJ) of 1982 distinguished between "telecommunications services," which Bell Operating Companies could offer when

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[4] *See Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17972-80, 17981, paras. 124-35, 137 (2010) (*Open Internet Order*).

[5] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services*, Notice of Inquiry, 7 FCC 2d 11 (1966).

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations* (*Second Computer Inquiry*), Docket No. 20828, Final Decision, 77 FCC 2d 384, 420, para. 97 (1980) (*Computer II Final Decision*).

[7] *Id.* at 420, para. 96.

[8] *Id.* at 428, para. 114.

[9] *Id.* at 420, para. 97.

[10] *Id.* at 428, para. 114.

"actually regulated by tariff,"[11] and "information services," including "data processing and other computer-related services"[12] and "electronic publishing services,"[13] which Bell Operating Companies (BOCs) were prohibited from offering under the terms of that court decision.[14] The Telecommunications Act of 1996's (the 1996 Act) "information service" definition is based on the definition of that same term used in the MFJ, which governed the Bell Operating Companies after the breakup of the Bell system.[15]

8. In the 1996 Act, intended to "promote competition and reduce regulation,"[16] Congress drew a line between lightly regulated "information services" and more heavily regulated "telecommunications services."[17] It also found that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation"[18] and declared it the policy of the United States to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[19] The 1996 Act went on to define "interactive computer service" to include "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet . . . ."[20]

9. For the next 16 years, the Commission repeatedly adopted a light-touch approach to the Internet that favored discrete and targeted actions over pre-emptive, sweeping regulation of Internet service providers. In the 1998 *Stevens Report*, the Commission comprehensively reviewed the Act's definitions as they applied to the emerging technology of the Internet and concluded that Internet access service was properly classified as an information service.[21] The *Stevens Report* also found that subjecting Internet service providers and other information service providers to "the broad range of Title II constraints," would "seriously curtail the regulatory freedom that the Commission concluded in *Computer II* was important to the healthy and competitive development of the enhanced-services industry."[22]

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[11] *U.S. v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 228-29 (D.D.C. 1982) (*MFJ Initial Decision*), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983).

[12] *Id.* at 179.

[13] *Id.* at 180.

[14] *Id.* at 228.

[15] *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21954, para. 99 (1996) (*Non-Accounting Safeguards Order*); *see also, e.g.*, H.R. Conf. Rep. No. 104-458 at 126 (Jan. 31, 1996) ("'Information service' and 'telecommunications' are defined based on the definition used in the Modification of Final Judgment."); *see also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11514, para. 28 (1998) (*Stevens Report*) (citing *MFJ Initial Decision*, 552 F. Supp. at 226-32).

[16] Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[17] 47 U.S.C. § 153(24), (53).

[18] 47 U.S.C. § 230(a)(4).

[19] 47 U.S.C. § 230(b)(1), (2).

[20] 47 U.S.C. § 230(f)(2).

[21] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536, para. 73 (1998) (*Stevens Report*).

[22] *Id.* at 11524, para. 46.

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

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[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,

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applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here.[733] Nor do we deprive the states of any functions expressly reserved to them under the Act, such as responsibility for designating eligible telecommunications carriers under section 214(e);[734] exclusive jurisdiction over poles, ducts, conduits, and rights-of-way when a state certifies that it has adopted effective rules and regulations over those matters under section 224(c);[735] or authority to adopt state universal service policies not inconsistent with the Commission's rules under section 254.[736] We appreciate the many important functions served by our state and local partners, and we fully expect that the states will "continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints" within the framework of this order.[737]

197. *Legal Authority.* We conclude that the Commission has legal authority to preempt inconsistent state and local regulation of broadband Internet access service on several distinct grounds.

198. First, the U.S. Supreme Court and other courts have recognized that, under what is known as the impossibility exception to state jurisdiction, the FCC may preempt state law when (1) it is impossible or impracticable to regulate the intrastate aspects of a service without affecting interstate communications and (2) the Commission determines that such regulation would interfere with federal regulatory objectives.[738] Here, both conditions are satisfied. Indeed, because state and local regulation of

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which states that "[n]othing in [the Act] shall in any way abridge or alter the remedies now existing at common law or by statute." 47 U.S.C. § 414; *see, e.g.*, Public Knowledge Reply at 27. Under this order, states retain their traditional role in policing and remedying violations of a wide variety of general state laws. *See Operator Service Providers of America Petition for Expedited Declaratory Ruling*, Memorandum Opinion and Order, 6 FCC Rcd 4475, 4477, para. 12 (1991) ("Section 414 of the Act preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation—remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." (footnote omitted)). The record does not reveal how our preemption here would deprive states of their ability to enforce any remedies that fall within the purview of section 414. In any case, a general savings clause like section 414 "do[es] not preclude preemption where allowing state remedies would lead to a conflict with or frustration of statutory purposes." *Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, As Amended*, Declaratory Ruling, 6 FCC Rcd 7511, 7513, para. 20 (1991).

[733] *See supra* Part C.3.

[734] *See* 47 U.S.C. § 214(e).

[735] *See* 47 U.S.C. § 224(c). We find no basis in the record to conclude that our preemption determination would interfere with states' authority to address rights-of-way safety issues. *See, e.g.*, CPUC Comments at 4-5 (discussing electrical safety requirements).

[736] *See* 47 U.S.C. § 254(h). We note that we continue to preempt any state from imposing any new state universal service fund contributions on broadband Internet access service. *See Title II Order*, 30 FCC Rcd at 5836-37, para. 490 n.1477.

[737] *Vonage Order*, 19 FCC Rcd at 22405, para. 1. *Cf.* ALEC Comments at 2-4 (discussing the role of state consumer protection laws); NARUC Comments at 4 (discussing "[s]tate authority to address service quality, fraud, issues of public health and safety/reliability, and universal service"); CPUC Reply at 13 (urging the Commission to preserve state authority to "advance universal service, protect the public safety and welfare, ensure the continued qualify of telecommunications services, [and] safeguard[] consumers' rights").

[738] *See, e.g.*, *Vonage Order*, 19 FCC Rcd at 22413-15, 22418-24, paras. 17-19, 23-32; *Minn. PUC*, 483 F.3d at 578-81. The "impossibility exception" was recognized by the Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 375 n.4 (1986) ("FCC pre-emption of state regulation [has been] upheld where it was *not* possible to separate the interstate and intrastate components of the asserted FCC regulation."), and has been applied in circumstances analogous to those here, *e.g.*, *Minn. PUC*, 483 F.3d at 578-81; *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994) (*California III*).

the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today, they are plainly preempted.

199. As a preliminary matter, it is well-settled that Internet access is a jurisdictionally interstate service because "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[739] Thus, when the Commission first classified a form of broadband Internet access service in the *Cable Modem Order*, it recognized that cable Internet service is an "interstate information service."[740] Five years later, the Commission reaffirmed the jurisdictionally interstate nature of broadband Internet access service in the *Wireless Broadband Internet Access Order*.[741] And even when the *Title II Order* reclassified broadband Internet access service as a telecommunications service, the Commission continued to recognize that "broadband Internet access service is jurisdictionally interstate for regulatory purposes."[742] The record continues to show that broadband Internet access service is predominantly interstate because a substantial amount of Internet traffic begins and ends across state lines.[743]

200. Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to interstate communications.[744] Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission's treatment of interstate traffic, the first condition for conflict preemption is satisfied.[745]

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[739] *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3701-02, para. 18 (1999)); *see also NARUC Broadband Data Order*, 25 FCC Rcd at 5054 n.24 ("Although the Commission has acknowledged that broadband Internet access service traffic may include an intrastate component, it has concluded that broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes."); *High-Cost Universal Service Support et al.*, Order on Remand, 24 FCC Rcd 6475, 6496 n.69 (2008) ("[S]ervices that offer access to the Internet are jurisdictionally interstate services. . . . [T]he Commission has reaffirmed this ruling for a variety of broadband Internet access services.") (collecting authorities).

[740] *Cable Modem Order*, 17 FCC Rcd at 4832, para. 59.

[741] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5911, para. 28.

[742] *Title II Order*, 30 FCC Rcd at 5803, para. 431.

[743] *See, e.g.*, Cox Comments at 35-37; Comcast Comments at 78-82; CTIA Comments at 54-55; NCTA Comments at 65; T-Mobile Comments at 25-26; Mobile Future Reply at 15.

[744] *Cf. California III*, 39 F.3d at 932 (upholding preemption where "the FCC determined that it would not be economically feasible . . . to offer the interstate portion of [enhanced] services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion"); *Vonage Order*, 19 FCC Rcd at 22419-21, para. 25 (discussing the difficulty of distinguishing intrastate and interstate communications over IP-based services); *see also* CTIA Comments at 57 ("While there likely are some slivers of broadband communications that do not cross state boundaries, it would be impossible to apply state regulation to those bits without affecting interstate traffic and thereby interfering with federal aims."); T-Mobile Comments at 26 ("During the course of a [single] fixed broadband connection, a user in one state will almost surely interact many times with information stored in other states and other nations. A mobile broadband communication involves that as well, [and] adds the possibility that the user herself will transit between or among states during the course of a single session."); CTIA Reply at 17 ("[F]ederal preemption is appropriate where, as here, it would be impossible to apply state regulation to this interstate offering without interfering with federal aims."); USTelecom Reply at 22 ("[T]he architecture of the Internet makes it impossible to separate the interstate and intrastate aspects of broadband service. . . . [O]ne could not plausibly offer a separate intrastate broadband internet access service."). We therefore reject the view that the impossibility exception to state jurisdiction does not apply because some aspects of broadband Internet access service could theoretically be regulated differently in different states. *Cf.* Public Knowledge Comments, CG Docket

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201. The second condition for the impossibility exception to state jurisdiction is also satisfied. For the reasons explained above, we find that state and local regulation of the aspects of broadband Internet access service that we identify would interfere with the balanced federal regulatory scheme we adopt today.[746]

202. Second, the Commission has independent authority to displace state and local regulations in accordance with the longstanding federal policy of nonregulation for information services.[747] For more than a decade prior to the 1996 Act, the Commission consistently preempted state regulation of information services (which were then known as "enhanced services").[748] When Congress adopted the

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No. 17-131, at 3 (June 16, 2017). Even if it were possible for New York to regulate aspects of broadband service differently from New Jersey, for example, it would not be possible for New York to regulate the use of a broadband Internet connection for *intrastate communications* without also affecting the use of that same connection for *interstate communications*. The relevant question under the impossibility exception is not whether it would be possible to have separate rules in separate states, but instead whether it would be feasible to allow separate state rules for intrastate communications while maintaining uniform federal rules for interstate communications.

[745] OTI insists that broadband service "can easily be separated into interstate and intrastate" communications based on "the location of the ISP." Letter from Chris Laughlin, Counsel for New America's Open Technology Institute, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108, at 3 (filed Dec. 7, 2017) (OTI Dec. 7 *Ex Parte* Letter). In OTI's view, if "the closest ISP headend, tower, or other facility to the customer" is in the same state as the customer, then the customer's Internet communications are all intrastate. *Id.* This view misapprehends the end-to-end analysis employed by the Communications Act to distinguish interstate and intrastate communications, which looks to where a communication ultimately originates and terminates—such as the server which hosts the content the consumer is requesting—rather than to intermediate steps along the way (such as the location of the ISP). *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd 3689, 3697-98, para. 12 (1999) ("Consistent with [our] precedents, we conclude . . . that the communications at issue here do not terminate at the ISP's local server, . . . but continue to the ultimate destination or destinations, specifically at a[n] Internet website that is often located in another state. The fact that the facilities and apparatus used to deliver traffic to the ISP's local servers may be located within a single state does not affect . . . jurisdiction. . . . Thus, we reject [the] assertion that the . . . facilities used to deliver traffic to ISPs must cross state boundaries for such traffic to be classified as interstate." (footnotes omitted)). Indeed, OTI's view that a communication is intrastate whenever the "last mile" facilities between the customer and the communications carrier are within the same state would improperly deem virtually all communications to be intrastate, including interstate telephone calls, contrary to long-settled precedent. *See id.* at 3696-97, para. 11 (discussing *Teleconnect Co. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1628-30, paras. 9-15 (1995), *pets. for review denied, Sw. Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997)).

[746] *See supra* para. 194.

[747] *See generally Pulver Order*, 19 FCC Rcd at 3316-23, paras. 15-25 (discussing the federal policy of nonregulation for information services).

[748] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, 541 n.34 (1981) ("[W]e have . . . preempted the states in two respects. . . . [W]e have determined that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation. . . . States, therefore, may not impose common carrier tariff regulation on a carrier's provision of enhanced services."), *pets. for review denied, Comput. & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 206-07, 209, 214-18 (D.C. Cir. 1982) (*CCIA*); *Computer III Phase I Order*, 104 FCC 2d at 1125, para. 343 ("In the *Computer II* proceeding . . . . we preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings."), *as modified, Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards*, Report and Order, 6 FCC Rcd 7571, 7625-37, paras. 110-131 (1991), *pets. for review denied, California III*, 39 F.3d at 931-33; *see also Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry) et al.*, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035, 3061 n.374 (1987) ("State public utility regulation of entry and service terms and conditions (including rates (continued....)

Commission's regulatory framework and its deregulatory approach to information services in the 1996 Act, it thus embraced our longstanding policy of preempting state laws that interfere with our federal policy of nonregulation.[749]

203. Multiple provisions enacted by the 1996 Act confirm Congress's approval of our preemptive federal policy of nonregulation for information services. Section 230(b)(2) of the Act, as added by the 1996 Act, declares it to be "the policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services"—including "any information service"—"unfettered by Federal or State regulation."[750] The Commission has observed that this provision makes clear that "federal authority [is] preeminent in the area of information services" and that information services "should remain free of regulation."[751] To this same end, by directing that a communications service provider "shall be treated as a common carrier under [this Act] only to the extent that it is engaged in providing telecommunications services," section 3(51)—also added by the 1996 Act—forbids any common-carriage regulation, whether federal or state, of information services.[752]

204. Finally, our preemption authority finds further support in the Act's forbearance provision. Under Section 10(e) of the Act, Commission forbearance determinations expressly preempt any contrary state regulatory efforts.[753] It would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place. Nothing in the Act suggests that Congress intended for state

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and feature availability), ostensibly applied to 'intrastate' enhanced services, would have a severe impact on, and would effectively negate, federal policies promoting competition and open entry in the interstate markets for such services."); *CCIA*, 693 F.2d at 214 ("Courts have consistently held that when state regulation of [communications] equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulation must necessarily yield to the federal regulatory scheme.") (footnotes omitted).

[749] *See City of New York v. FCC*, 486 U.S. 57, 66-70 (1988) (holding that because the Commission had preempted all state and local regulation of cable television signal quality for 10 years before the passage of the Cable Communications Policy Act of 1984, and the Cable Act generally adopted the same regulatory framework that the Commission had been following, Congress implicitly approved the Commission's authority to preempt these laws). Contrary to the suggestions of some commenters, the Supreme Court has held, in cases involving the Communications Act, that no express authorization or other specific statutory language is required for the Commission to preempt state law. *See id.* at 64 ("[A] pre-emptive regulation's force does not depend on express congressional authorization to displace state law. . . . [I]f the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute, [it] should not [be] disturb[ed] . . . unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." (internal quotation marks omitted)); *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375 n.4 (recognizing implicit FCC preemption authority under the impossibility exception to state jurisdiction). And because the Supreme Court has interpreted the Communications Act to authorize the Commission to supersede state law in many respects, we reject the contention that any presumption against preemption controls here. *See Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (once Congress has decided to preempt state law, "we do not invoke any presumption against pre-emption" in disputes over the *scope* of preemption); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 743-44 (1996) (distinguishing "the question of the substantive (as opposed to pre-emptive) *meaning* of a statute" from "the question *whether* a statute is pre-emptive" and rejecting the view that a presumption against preemption "in effect trumps *Chevron*").

[750] 47 U.S.C. § 230(b)(2), (f)(2).

[751] *Pulver Order*, 19 FCC Rcd at 316, para. 16; *see also Vonage Order*, 19 FCC Rcd at 22425-26, paras. 34-35.

[752] 47 U.S.C. § 153(51)

[753] 47 U.S.C. § 160(e).

or local governments to be able to countermand a federal policy of nonregulation or to possess any greater authority over broadband Internet access service than that exercised by the federal government.[754]

8. Disability Access Provisions

205. The Communications Act provides the Commission with authority to ensure that consumers with disabilities can access broadband networks regardless of whether broadband Internet access service is classified as telecommunications service or information service. The Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)[755] already applies a variety of accessibility requirements to broadband Internet access service.[756] In particular, to ensure that people with disabilities have access to the communications technologies of the Twenty-First Century, the CVAA added several provisions to the Communications Act, including Section 716 of the Act,[757] which requires that providers of advanced communications services (ACS)[758] and manufacturers of equipment used for ACS make their services and products accessible to people with disabilities, unless it is not achievable to do so.[759] These mandates already apply according to their terms in the context of broadband Internet access service.[760] The CVAA also adopted a requirement, in section 718, that ensures access to Internet browsers in wireless phones for people who are blind and visually impaired.[761] In addition, the CVAA directed the Commission to enact regulations to prescribe, among other things, that networks used to provide ACS "may not impair or impede the accessibility of information content when accessibility has been incorporated into that content for transmission through . . . networks used to provide [ACS]."[762] Finally, new section 717 creates new enforcement and recordkeeping requirements applicable to sections 255, 716, and 718.[763] Section 710 of the Act addressing hearing aid compatibility and implementing rules

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[754] Some commenters note that section 253(c), 47 U.S.C. § 253(c), preserves certain state authority over telecommunications services. But that provision has no relevance here, given our finding that broadband Internet access service is an information service. Although section 253(c) recognizes that states have historically played a role in regulating telecommunications services, there is no such tradition of state regulation of information services, which have long been governed by a federal policy of nonregulation.

[755] Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (codified in various sections of Title 47) (CVAA), *amended by* Pub. L. No. 111-265, 124 Stat. 2795 (2010) (technical corrections).

[756] *Title II Order*, 30 FCC Rcd at 5828, para. 473. Congress adopted the CVAA after recognizing that "Internet-based and digital technologies . . . driven by growth in broadband . . . are now pervasive, offering innovative and exciting ways to communicate and share information." S. Rep. No. 111-386, at 1 (2010); H.R. Rep. No. 111-563, at 19 (2010). Congress thus clearly had Internet-based communications technologies in mind when enacting the accessibility provisions of Section 716 (as well as the related provisions of sections 717-718) and in providing important protections with respect to advanced communications services (ACS).

[757] 47 U.S.C. § 617(f) ("The requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 of this title on the day before October 8, 2010. Such services and equipment shall remain subject to the requirements of section 255 of this title.").

[758] ACS means: "(A) interconnected VoIP service; (B) non-interconnected VoIP service; (C) electronic messaging service; and (D) interoperable video conferencing service." 47 U.S.C. § 153(1).

[759] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010 et al.*, CG Docket No. 10-213 et al., Second Report and Order, 28 FCC Rcd 5957, para. 1 (2013) (*Section 716 Implementation Order*).

[760] *Section 716 Implementation Order*, 28 FCC Rcd at 5960-61, para. 7.

[761] 47 U.S.C. §§ 617, 619.

[762] 47 U.S.C. § 617(e)(1)(B); *see also* 47 CFR § 14.20(c).

[763] 47 U.S.C. § 618.

enacted thereunder also apply regardless of any action taken in this Order.[764] To the extent that other accessibility issues arise,[765] we will address those issues in separate proceedings in furtherance of our statutory authority to ensure that broadband networks are accessible to and usable by individuals with disabilities.[766]

9. Continued Applicability of Title III Licensing Provisions

206. We also note that our decision today to classify wireless broadband Internet access service as an information service does not affect the general applicability of the spectrum allocation and licensing provisions of Title III and the Commission's rules to this service.[767] Title III generally provides the Commission with authority to regulate "radio communications" and "transmission of energy by radio."[768] Among other provisions, Title III gives the Commission the authority to adopt rules preventing interference and allows it to classify radio stations.[769] It also establishes the basic licensing scheme for radio stations, allowing the Commission to grant, revoke, or modify licenses.[770] Title III further allows the Commission to make such rules and regulations and prescribe such restrictions and conditions as may be necessary to carry out the provisions of the Act.[771] Provisions governing access to and use of spectrum (and their corresponding Commission rules) do not depend on whether the service using the spectrum is classified as a telecommunications or information service under the Act.

IV. A LIGHT-TOUCH FRAMEWORK TO RESTORE INTERNET FREEDOM

207. For decades, the lodestar of the Commission's approach to preserving Internet freedom was a light-touch, market-based approach. This approach debuted at the dawn of the commercial Internet during the Clinton Administration, when an overwhelming bipartisan consensus made it national policy to preserve a digital free market "unfettered by Federal or State regulation."[772] It continued during the Bush Administration, as reflected in the "Four Freedoms" articulated by Chairman Powell in 2004 and was then formally adopted by a unanimous Commission in 2005 as well as in a series of classification decisions reviewed above.[773] And it continued for the first six years of the Obama Administration. We reaffirm and

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[764] *See generally* 47 U.S.C. § 610; *see also Improvements to Benchmarks and Related Requirements Governing Hearing Aid-Compatible Mobile Handsets; Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets,* Fourth Report and Order and Notice of Proposed Rulemaking, 15 FCC Rcd 13845, 13846, para. 2 (2015).

[765] *See, e.g.*, CPUC Comments at 25-26; CTAB Comments at 8; TDI et al. Comments at 2-7; Public Knowledge Comments at 95.

[766] *See* CenturyLink Comments at 60; ACA Reply at 30.

[767] *Wireless Broadband Internet Access Order*, 22 FCC Rcd at 5914-15, paras. 35-37. These provisions and rules continue to apply because the service is using radio spectrum.

[768] *See* Title III - Provisions Relating to Radio, 47 U.S.C. § 301 et seq.; *see also IP-Enabled Services NPRM*, 19 FCC Rcd at 4918.

[769] 47 U.S.C. §§ 302, 303.

[770] 47 U.S.C. §§ 307-309, 312, 316.

[771] 47 U.S.C. § 303(r). *See, e.g., Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 16340, 16452, para. 27 (1999).

[772] 47 U.S.C. § 230(b)(2).

[773] These include the freedoms for consumers to (1) "access the lawful Internet content of their choice"; (2) "run applications and use services of their choice, subject to the needs of law enforcement"; (3) "connect their choice of legal devices that do not harm the network"; and (4) "enjoy competition among network providers, application and service providers, and content providers." *Internet Policy Statement*, 20 FCC Rcd at 14988, para. 5; *see also Powell Speech* (announcing four principles for Internet freedom to further ensure that the Internet would remain a place for free and open innovation with minimal regulation).