

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

In the Matter of

Implementation of Section 621(a)(1) of the  
Cable Communications Policy Act of 1984  
as Amended by the Cable Television  
Consumer Protection and Competition Act  
of 1992

MB Docket No. 05-311

**COMMENTS OF PUBLIC KNOWLEDGE**

Whatever the scope of the Commission's authority to control how LFAs can regulate cable operators pursuant to Section 624, its attempt to preempt LFA and local regulation of information services more generally is beyond the FCC's power. The FCC's power to preempt is concomitant with its power to regulate. Absent an assertion of ancillary jurisdiction, the FCC lacks authority over information services. It therefore has no ability to preempt their state and local regulation.

In general, the *Second FNPRM's* tentative conclusion that LFA regulation of "new information services, including broadband Internet access services" is preempted because it would be "inconsistent with longstanding federal policy" is flawed for the same reasons the same preemption analysis, as put forth in its *Restoring Internet Freedom* order,<sup>1</sup> is also flawed. In short, the Commission believes it has the plenary authority to preempt state regulation of information services, as it does over telecommunications services.<sup>2</sup> It does not.

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<sup>1</sup> 33 FCC Rcd 311, ¶¶ 194, 197-204 (2017).

<sup>2</sup> See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 US 355, 360 (1986).

The distinction between telecommunications and information services is intended to reiterate the previous distinction between basic services, which were regulated by the FCC, and enhanced services, which were not.<sup>3</sup> Having classified broadband as an information service, the Commission has determined that it is an unregulated service that it lacks regulatory authority over. The Commission nevertheless asserts that because broadband is “interstate,”<sup>4</sup> it possesses preemption authority. But the Commission “cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services or its Title I jurisdiction over matters ‘incidental’ to communication by wire.”<sup>5</sup> The fact that the Commission has traditionally held broadband traffic (*not* all aspects of broadband service<sup>6</sup>) to be interstate has no bearing on this; the Commission only has authority over those interstate communications services that the statute gives it.

The Commission has also declined to assert ancillary authority over broadband. Using ancillary authority, the Commission can extend its authority over services that fall within its general jurisdictional scope of “communications by wire or radio,”<sup>7</sup> but that it otherwise lacks specific authority to regulate, if it can show that doing so is “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under

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<sup>3</sup> See Amendment of Section 64.702 of the Commission’s Rules and Regulations, *Final Decision*, 77 F.C.C.2d 384, ¶¶ 7, 128, 129 (1980) (*Computer II*); Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, 9179-9180, ¶ 788 (1997) (Telecommunications Act of 1996’s definition of “information services” includes past “enhanced services” analysis).

<sup>4</sup> *Second FNPRM* ¶ 29.

<sup>5</sup> *Public Serv. Comm’n of Maryland v. FCC*, 909 F.2d 1510, 1515 n.6 (D.C. Cir. 1990).

<sup>6</sup> See *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, ¶ 59 (2002).

<sup>7</sup> See *American Library Ass’n. v. FCC*, 406 F. 3d 689 (DC Cir. 2005).

the statute.<sup>8</sup> (Of course this does not mean that the Supreme Court has authorized the Commission to exceed its statutory authority; rather, ancillary authority over particular communications services is an exercise of its authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.”<sup>9</sup>)

An example of where the Commission has done this is with respect to the regulation of interconnected VOIP. (The Commission has failed to determine whether VOIP is a telecommunications service or an information service, but for the purpose of this discussion it can be presumed to be an information service.<sup>10</sup>) There, the Commission has expressly asserted its authority to regulate that service; consequently, it has the authority to preempt its state regulation. The Commission frequently touts<sup>11</sup> a line of cases<sup>12</sup> that state this uncontroversial fact. But they merely demonstrate that once the Commission has asserted ancillary authority over a service, its authority may include preemption. While these cases do not discuss the fact of the Commission extension of its powers via ancillary authority because the validity of this exercise was not in dispute between the parties, this omission should not be read to give the Commission the extra-statutory ability to regulate,

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<sup>8</sup> *United States v. Southwestern Cable*, 92 US 157, 178 (1968).

<sup>9</sup> 47 U.S.C. § 154(i).

<sup>10</sup> See IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, *First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 10245, ¶¶ 26, 27 (2005) (concluding that the Commission has direct authority to promulgate a rule concerning interconnected VOIP if it is a telecommunications service, and ancillary authority if it is an information service, and declining to formally classify interconnect VOIP as one or the other).

<sup>11</sup> See Restoring Internet Freedom, ¶ 194 n. 727; Chairman Pai Statement on Eighth Circuit Affirmation That State Efforts to Regulate Information Services Are Preempted (Sep. 7, 2018), <https://docs.fcc.gov/public/attachments/DOC-353991A1.pdf>

<sup>12</sup> E.g. *Minnesota Public Utilities Com’n v. FCC*, 483 F. 3d 570 (8th Cir. 2007) and *Charter Advanced Services v. Minnesota Public Utilities Com’n*, Case. No. 17-2290 (8th Cir. 2018),

or preempt the regulation, of services it has no authority over. Other cases the Commission has relied on<sup>13</sup>—notably *CCIA v. FCC*—expressly discuss how the Commission has grounded its preemption of state regulation (in that case, of enhanced services offered by common carriers) in a proper exercise of ancillary authority. The Commission can hardly claim to be unaware of this essential point given how the D.C. Circuit later expressly explained that “The crux of our decision in *CCIA* was that ... the Commission had linked its exercise of ancillary authority to its Title II responsibility over common carrier rates...”<sup>14</sup>

Additionally, the “longstanding federal policy” the Commission refers to<sup>15</sup> is nonexistent. (Nevermind that a “policy” cannot preempt states to begin with,<sup>16</sup> and that the Commission’s argument, in a circular fashion, depends on misclassifying broadband ISPs as information services to begin with.) In support of this alleged policy the Commission relies on Section 230 of the 1996 Act<sup>17</sup>—a provision which has a state law savings clause.<sup>18</sup> And Section 706 of the Act directs both states and the Commission to consider “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment,” measures which simply make no sense under the Commission’s deregulatory framing.<sup>19</sup> Specifically with respect to LFAs, the 1996 Act added the prohibition that “A franchising authority may not impose any requirement under this

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<sup>13</sup> E.g., *Comput. & Commc’ns Indus. Ass’n v. FCC*, 693 F.2d 198, (D.C. Cir. 1982), discussed in *Restoring Internet Freedom*, ¶ 202 n.748.

<sup>14</sup> *Comcast Corp. v. FCC*, 600 F.3d 642, 656 (2010).

<sup>15</sup> *Second FNPRM* ¶ 29.

<sup>16</sup> *Comcast*, 600 F.3d at 651-58.

<sup>17</sup> *Restoring Internet Freedom* ¶ 203.

<sup>18</sup> 47 U.S.C. § 230(e)(3).

<sup>19</sup> 47 U.S.C. § 1302(a).

subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator.”<sup>20</sup> Had Congress intended to limit LFA authority over information services, rather than just telecommunications, it would have done so.

To step back from the legal minutia, it is worth reflecting how broad the Commission’s irresponsible claim that it can preempt all state and local regulation of information services really is. The Commission noted in 1980 that “[t]here are literally thousands of unregulated computer service vendors offering competing services connected to the interstate telecommunications network.”<sup>21</sup> Of course there are exponentially more today—every website, every online or cloud service, every social network, every online video service, would be classified as an “information service” under the Act. Amazon AWS is an information service. Spotify is an information service. Craigslist is an information service, and so are Facebook, Twitter, and Apple’s App Store. For that matter, sites that serve up malware or pirated software, control servers for spam or robocalls, and sites on the “dark web” are all information services. *Any* service that uses communications for “generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information”<sup>22</sup> is an information service. In its attempt to enact “deregulatory” policies, the Commission has claimed jurisdiction over them all—indeed, it can be read to have attempted to preempt the abilities of states and local governments to regulate them at all, including to protect public safety, protect against fraud, or to limit the traffic in illegal

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<sup>20</sup> 47 U.S.C. § 541(b)(B). Notably, even this provision only restricts an LFA’s authority “under this subchapter,” as opposed to more broadly removing LFA authority under other provisions of law.

<sup>21</sup> 77 F.C.C.2d 384, ¶ 109 (1980).

<sup>22</sup> 47 U.S.C. § 153(24).

goods and services. Having decided that broadband is an information service, the Commission's regulatory decisions and legal determinations concerning broadband presumably apply to all other information services. In this case, in its attempt to strip local governments of authority to regulate information services in the public interest, the Commission has failed to consider either the potential unintended consequences of its actions or the implications for the scope of its own authority.

Respectfully submitted,

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