

## UPDATE TO FEDERAL TELECOMMUNICATIONS LAW 2020

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Thesis: "*Kingsbury to Comcast: US Network Openness and Regulation*"

### I What is new at the Federal Communications Commission?

#### A. The chairman Ajit Pai.



Chairman Pai, 46 is an attorney who graduated from the University of Chicago Law School after a Harvard undergraduate degree. He has served as an attorney in the Department of Justice in the Anti-Trust Division. He has also been an associate general counsel for Verizon. He was first nominated to the FCC commission in 2012 by President Obama and then President Trump nominated him as chair of the FCC in 2017.

He is the son of two physicians who emigrated from India. He grew up in the small town of Parsons in southeast Kansas. He has always opposed FCC regulated Net Neutrality and favors open market solutions.

#### B. Other commissioners: the five member commission must have two members of each party and then the party in control of the presidency nominates the chair. All are subject to Senate approval.

1. Michael O'Reilly R
2. Brendan Carr R
- 3, Jessica Rosenworcel D
4. Geoffrey Starks D

C. Why just Federal? Because the courts have held that Title 47 (the 1934 and 1996 Acts which establishes the FCC) pre-empt state regulation under the Supremacy Clause. There is very little state regulation. Title 47 applies to "**all interstate or foreign communications by wire or radio...**" 47 USC 152. Title 47 has 335 unannotated pages. 47 CFR has five volumes. Title 47 also provides for regulation of broadcasting in radio and tv, cable, satellite and international cable landing rights/regulation. Most of these are considered to be non-telecommunication services. FCC has approximately 1700 employees and \$400 million annual budget. The FCC is an independent agency.

II, **What happened to net neutrality?** If you remember four years ago the big issue facing the FCC was the question of whether the FCC could or should regulate the internet as or similar to what is called a common carrier.

- A. What is net neutrality? The debate has been whether market forces or FCC regulation should control how the internet develops to insure transparency, connectivity and a lack of discrimination. The regulation crowds says control the internet before the big companies controlling access to the wires and radio start to discriminate against little guy end users, new apps, new content, in essence "walled gardens." The free market crowd says that is nonsense and regulation will kill off innovation and growth. Why would big companies such AT&T, Verizon, Comcast, Charter do things that would hurt business?
- B. A common carrier is an entity which cannot discriminate in its provision of services. The concept of common carriage has its roots in English common law when the king granted someone a license to operate a bridge or inn at a crossroads. In modern times the doctrine is usually scene in areas where natural monopolies exist such as utilities or taxi services or telephone/telegraph companies. Natural monopolies exist where it is difficult to replicate a service network that is in place such a railroad. Natural monopolies encourage discriminatory behavior and price gouging and barriers to entry.

C The concept of natural monopolies is built into Title II of the 1934/1996Telecommunications Act. Sections 47-201 and 202 provide that no common carrier

engaged in telecommunication services may discriminate in providing services, engage in unreasonable practices or charge unreasonable rates. Section 251 mandates interconnection between telecom services providers. Section 205 provides for rate regulation.

D. The difference is that the regulatory burden under Title II for telecommunications services is that of a common carrier for Sections 201 and 202. If you are an information service the regulation is much lighter under Title I.

D. What is a telecommunications service? Is the internet a telecommunications service?

47 USC 153(43) states telecommunications means the transfer of information between points of the users choosing without change in the content

47 USC 153(46) states telecommunications service is the offering of telecommunications to the public for a fee.

47 USC 153(44) states telecommunications carrier is anyone who provides a telecommunications service.

47 USC 153(20) states an information service is the offering of a means of generating, acquiring storing, processing, retrieving, utilizing or making available information via a telecommunications service.

47 USC 153(10) states a common carrier is any person engaged as a common carrier for hire in interstate or foreign communications by wire or radio.

There is no definition of communication or communicating.

NCTA v. Brand X (2005)---a small local ISP in California was denied access to provide its service over local cable and telephone lines. It filed complaint with FCC stating that it provided "telecommunications services" and therefore was entitled to interconnect under Title II. FCC stated that the ISP was an "information service" and not entitled to Title II interconnections and discrimination protection. Circuit Court of DC disagreed and then US Supreme disagreed. Justices Scalia and Thomas talk about pizza!.

Free Press v. Comcast---In 2006 Free Press filed a complaint with the FCC alleging that Comcast substantially "downgraded" the service to its customers who were using peer to peer technology to downloading movies. Comcast was not notifying users. Comcast argued network management defense. In 2008 FCC ordered Comcast to cease and adopted the Internet Policy Statements its guidelines. Openness, transparency, notice of network management. Later became the Internet Openness Order in 2010.

In 2012 the FCC rewrote partially the 2010 order and used again subjected the big telecom provider of internet service as subject to the rules of interconnection, non-discrimination (treating some content providers better) and reasonable network management. Verizon and other providers sued in federal district court in *Verizon et al vs, FCC*. The DC Court of Appeal struck down part of the order saying the FCC must reclassify internet as a telecommunications service rather than an information service.

In 2015 the Obama FCC did just that and re-imposed the rules. Several telecoms appealed in *United States Telecom A'ssn vs. FCC* appealed to the DC Court of Appeals. The court upheld the FCC's authority to reclassify. The telecoms appealed to the Supreme Court and the Court denied cert in November, 2018. Roberts and Thomas recused themselves. Thomas, Alito and Gorsuch dissented that the case should be considered moot because of the 2017 order. The other four justices let the Appeals court opinion stand.

In December 2017 the commission under Pai repealed the rules as well as prohibited states from imposing their own net neutrality rules under the theory of preemption

E. The 2018 FCC order. *In the Matter of Internet Freedom WC* Docket 17-108 (adopted December 2017, released in January 2018 and effective June 11, 2018 and published at FCC 17-166). All 569 pages. Dissents by Rosenworcel and Clyburn (term expired). The Declaratory Ruling and Order was published in the Federal Register on February 22, 2018 giving opponents 60 days to repeal under the Congressional Review Act

1 Twenty two states appealed to the DC Court of Appeals. (yes Thomas J. Miller for petitioner Iowa....didn't see Nebraska listed...6 1/2 pages for list of counsel)

2. Mozilla and others filed an appeal in the same circuit and the cases were consolidated as *Mozilla*.

3. The FCC ruled on the basis of *Brand X* it should reclassify internet and mobile broadband as an "information service" because of DNS and caching. DNS (domain name system) is the method we used to connect to websites. Every website has a name (actually a number) and the hardware we use recognizes the names and takes you there. Caching is stored information.

F. *Mozilla v FCC*, Argued February 1, 2019 and ruling issued October 1, 2019 and 186 pages (you can tell the Court of Appeals is just about sick of this issue....we are well versed in this and once again the FCC has changed its tack)

1. How do federal agencies change the definition of statutes when administrations change?

Using their delegation and rulemaking ability under the APA, the agencies pass, amend or rescind rules in the CFR. The Supreme Court has fostered the principle of what is called the *Chevron Doctrine*. This doctrine gives judicial deference to agencies to define terms in their area of expertise. The courts will not overrule agencies' definitions if the definitions are "reasonable." Reasonable means that the agency cannot contradict a clear congressional meaning but if there is an ambiguity the Courts will defer to agency interpretation in their area of expertise. Maybe the idea is that since Congress delegated the authority Congress should clean it up. And, of course, as the politics of the agency change so do the definitions.

2. Petitioners argued misinterpreted the definitions and that the decision was arbitrary and capricious (always an APA argument) and that the FCC should not have relied on the 20 million comments on their website (The FCC admitted in August of 2019 their website was hacked and many comments were unreliable).

3. The Court did find the FCC acted arbitrarily in failing to consider the impact of its ruling on local emergency access. The city of Santa Clara CA at one time had its emergency service information throttled. One of the FCC duties is the protection of life and property through telecommunications. The Court also found that FCC failed to consider the issue how the rule would affect "pole location." Under Title II regulation public utilities are required to allow all telecom services to locate equipment on the poles. If broadband is an information service this requirement does not apply. The Court remanded these issues to the FCC for further findings.

### III. Maybe it is not all Federal.....

A. Iowa..Iowa Utilities Commission is a division of the Iowa Department of Commerce. The Commission is enabled under Iowa Code 476. The Commission has 3 members appointed by the governor to six year terms. The Commission may establish rules regarding the provision of telecommunication for "public utilities."

1. What is a public utility? Generally only the larger carriers such Windstream. Small independents with less than 15,000 customers or 15,000 access lines are not covered (Marne Elk Horn) or mutual whose customers own 50% of the mutual are not included (FMTC Harlan) or city owned telecom services (Harlan)

2. What is regulated?

a. Rate/price. PUs can choose whether to be regulated by price (related to inflation) or rate(their cost).

b. Discrimination ,,no Pu can act discriminatorily in terms of interconnection or price of services.

c. Wireless and the Internet are not regulated. Iowa has adopted nothing on net neutrality but did sniff at a couple bills.

- B. Nebraska...Nebraska Public Service Commission. The Commission a five member elected body established by Nebraska Constitution Article IV Section 20. Terms are 6 years with pay of \$75,000.
1. Telecommunications. PSC basically exercises no regulation over wireline telecom providers other than to investigate complaints. PSC does not involve itself in wireless.
  2. However, in 2019 the Commission set in effect spending on the Nebraska Universal Service Fund (it is there on your bill just like federal USF) to expend wireless broadband and tower building with grants in Nebraska wide open spaces which are considered "high cost." 2019 Annual report to Legislature...our rural coverage sucks.
  3. Nebraska looked at a bill on net neutrality.
- C. California...now here is a state serious about net neutrality.
1. California Consumer Protection and Neutrality Act of 2018. No blocking, no discrimination, no payment for edge users, consumers can use their own equipment et cet. Within hours after the act became effective the Justice Department filed suit against CA. CA suspended implementation until completion of the case....years.
  2. 2. Pre-emption. The LA Times story in October 2019 stated that the *Mozilla* decision was good news for the states battle for net neutrality and even quoted and instructor from Nebraska College of Law telecom program. The NY Times was in agreement. But...not so fast. The doctrine of pre-emption based on the Supremacy Clause...United States Constituting Art. VI Sec 1 Clause 2. Since *McCullough v. Maryland* preemption occurs when congress expressly or impliedly (occupies the field or when state regulation directly is in conflict a with a federal program. The question is if non-regulation is preemptive.
- D. In the 2018 order the FCC issued a preemptive directive that all state laws affecting the delivering of fixed or wireless broadband were declared preempted. This was a real reach for the FCC. The *Mozilla* court that the FCC lacked the authority to ban all state laws in an area it had chosen not to regulate. Under Title II the court noted that such a declaration might work. The FCC argued several sections of the Telecommunications Act give it authority but the court said "no dice." literally. The court noted there was no ruling by the FCC on the traditional preemption analysis and the issue was not

before the court, so the State's celebration may be pre-mature. So, non-regulation might be preemptive.

#### IV. News

- A. Russia and China generously offer to control the internet.
- B. In January 29, 2020 Facebook announced settlement for \$550 million for facial analysis recognition. Using an Illinois biometric privacy law Facebook users sued claiming the facial recognition in "tagging" photos to recommend friend suggestions was a violation of their privacy. Some companies are selling facial recognition apps to law enforcement....hey it works well in China.

On February 13, 2020 a class action lawsuit was filed in New York by Illinois plaintiffs against Clearview AI claiming that it's facial recognition technology violates the same Illinois biometric privacy law. The company sold its technology to the Chicago Police Department. Clearview searches websites and pull photos and identifying information using AI.

- C. Sprint T Mobile merger unblocked...Sprint bankruptcy? Sprint was facing the very high likelihood of bankruptcy because of its cut-rate pricing. On February 10, 2020 US District Judge Victor Marrero (SDNY) allowed the merger to go through. Numerous states were arguing the merger violated Clayton Act anti-trust laws and would allow T-Mobile/Sprint would harm consumers with anti-competitive behavior and less competition in the market. The states also argued that Sprint was a viable company. Judge Marrero disagreed and denied the injunction attempting to block the FCC and the FTC approval. After a two week hearing, Judge Marrero issued a 170 page ruling. Sprint the #4 wireless carrier based in Overland Park, Kansas had been losing a 1,000 jobs a year for the last 20 years. The merger is set forth April 1, 2020 and will cost number 3 T-Mobile \$26.5 billion. States may appeal. The deal provides that T-Mobile will sell most of Sprint's customers to Dish who is going into the wireless market and allows Dish to use T-Mobile's network during the required Dish 5g buildout. AT & T is the number one at \$274 billion. Verizon is number 2 at \$242 billion and the new T-Mobile at \$120 billion. The litigation lasted 7 years. The DOJ is looking at Google.

Verizon and AT & T are the last of the baby bells (RBOC) which were divested by AT & T Corp in 1982 under ant-trust suit. While CenturyLink survives, it is not in the wireless business (formerly NW Bell, then Qwest). CenturyLink is in the long lines business and just signed 15 year \$470 million agreement to work with Social Security

Administration. Sprint grew up in Kansas as Brown Telecommunications, merged with Nextel. T-Mobile is owned by Deutsche Telekom.

- D. FCC finds an unnamed carrier illegally sold real time location for mobile customers to outside source. Bonding companies have been buying the information to locate bond jumpers. Chairman Pai sends letters to the House Energy and Commerce committee members but did not specify the law or the carrier. January 31, 2019.