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The Unique U.S. Legal Battle over Governance of Internet-Related Services

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Introduction

In the U.S., the regulatory jurisdiction of the federal and state governments over services provided through access to the Internet or use of Internet protocol technology is in flux and has become increasingly unstable. This instability is exemplified by the network neutrality debate, which has become a legal battle over classification of broadband Internet access services as a “telecommunications service” or “information service” under the federal Communications Act of 1934, as amended by the Telecommunications Act of 1996. In pursuit of deregulatory policies – whether sought by policymakers or entities seeking to avoid regulation – service classification has become the focal legal tactic to avoid federal and state government regulation. The instability of network neutrality policy is reflected by the fact that, since about 2000, the service classification of broadband Internet access services (BIAS) as a telecommunications or information service by the Federal Communications Commission (FCC) has shifted back and forth, depending upon whether the majority of FCC commissioners has been appointed by the Republican or Democratic Party.¹

This same legal tactic of focusing on service classification is also being utilized to challenge the scope of federal and state regulatory authority over fixed, interconnected voice-over-Internet Protocol service (I-VOIP), which consumers find indistinguishable from traditional, time-division multiplexing (TDM-based) voice telecommunications services. However, the legal battle over classification of I-VOIP is less prominent in the popular press or public awareness — at least in part, from the relatively lower profile of the classification issue before the FCC.

Through success of this legal tactic of service classification, businesses based on provision of services through the use of the Internet Protocol have been emboldened to manipulate technical aspects of providing service for the purpose of avoiding regulation. Taken to the limit, this could lead to a de facto repeal of telecommunications service regulation. As for potential governance of the “Internet of Everything”, it is critical that discussion proceed from awareness of this U.S. legal landscape and context, which affects not only U.S. regulation but also U.S. participation in or impact on international governance developments.

¹ The author discusses the reasons for this instability of network neutrality policy in a forthcoming book chapter, titled “Escalating Instability of Network Neutrality Policy in the U.S.”

The Significance of Service Classification

The purpose of this paper is to heighten awareness of the legal battle over service classification as a strategy by proponents of deregulation to avoid federal and state regulation. To accomplish this purpose, however, it is necessary to describe the basic outlines of the legal arguments. An overview of the legal analysis of the specific statutory definitions of telecommunications and information services is provided here. The legal analysis is provided in greater depth in Cherry & Peha (2014).

The significance of service classification is that the classification of a service under the federal Communications Act affects the business models that the providers of that service are permitted to use pursuant to a regulatory framework applicable to that service. The legal standard for service classification is the **functionality** of the service, as described in statutory definitions. Of relevance here is the distinction between telecommunications services and information services.

Under the Act, “The term ‘telecommunications service’ means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used” (47 U.S.C. §153(46)). Thus, a “telecommunications service” is defined in terms of **two components of functionality – a technical functionality component and a commercial functionality component**. First, a telecommunications service must offer the underlying technical functionality of “telecommunications”, defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received” (47 U.S.C. §153(43)).² Second, a telecommunications service must offer this technical functionality through a specific commercial means: “for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used.” This commercial functionality component is the basis for distinguishing between common carriage and private carriage of telecommunications.³ Importantly, the commercial functionality of “telecommunications service” does not require the existence of monopoly or an assessment of market structure.

² This technical functionality of transmission is often referred to as the conduit function.

³ Similarly, “mobile service” is composed of the underlying technical functionality defined in 47 U.S.C. §153(27), and section 332 differentiates between commercial mobile service and private mobile service.

Under the Act, “information service” is defined in terms of its technical functionality as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service” (47 U.S.C. §153(20)). Importantly, this definition of an information service has **two components - technical functions that must exist as well as technical functions that are specifically excluded.**⁴ Moreover, given these definitions, the FCC has interpreted telecommunications and information services to be **mutually exclusive, based on their differences in technical functionality.**⁵

As previously stated, the classification of a service under the federal Communications Act affects the business models that the providers of that service are permitted to use. If a service is a “telecommunications service”, then it is a **common carriage service** under Title II. The basic duties of a common carrier, originating under the common law, are to provide service upon reasonable request, without unreasonable discrimination, at just and reasonable rates, and with adequate care. Title II provides the statutory framework for enforcing these obligations of common carriers, subject to what is referred to as dual jurisdiction: the FCC has regulatory authority in interstate commerce, and the States’ have regulatory in intrastate commerce. Most States, in turn, have delegated regulatory authority to a state commission.

If a service is an “information service”, then it is a **non-common carriage service** under Title I, for which the FCC’s jurisdiction is weak and ill-defined. Moreover, the States’ regulatory authority over information services is also ill-defined. Although the federal D.C. Circuit of Appeals has ruled that common carriage-type requirements cannot be imposed on information services, both the FCC and the States do have the authority to impose some requirements on information services.⁶ However, the permissible scope of such requirements is not well-defined and subject to ongoing litigation.

⁴ The exclusion of “any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service” is often referred to as the telecommunications management exception.

⁵ See *In the Matter of Federal-State Joint Board on Universal Service* (1998) (“*Universal Service Report*”).

⁶ The relevant court decisions by the D.C. Circuit Court of Appeals are *Comcast v. FCC* (2010) and *Verizon v. FCC* (2014), which are discussed in the next section of this paper.

Service Classification of BIAS

For BIAS service, the affected business model involves two-sided markets (customers; content/application providers). For this reason, the service classification of BIAS affects the regulatory framework applied to both markets. As the following overview explains, the classification of BIAS services by the FCC has been unstable since the early 2000's.

Beginning in the 1990's, when telephone companies provided commercial access to the Internet as a dialup service over telephone lines using narrowband technology, the FCC deemed such services to be telecommunications services. This classification continued, initially, when telephone companies offered Internet access through digital subscriber line (DSL) technology, which brought high-bandwidth information to homes and small businesses over ordinary copper telephony lines.

However, in 2002, a Republican majority of FCC commissioners classified BIAS provided by cable companies, using modems over coaxial cable lines, as an information service (*Internet Over Cable Declaratory Ruling*, 2002). In so doing, the FCC declined to apply the classification of telecommunications services used for DSL to cable companies' cable modem services. As a result, the FCC created asymmetric service classifications between the competing higher bandwidth Internet access services provided via DSL versus cable modem technologies. In *Brand X Internet Services v. FCC* (2003), the federal Ninth Circuit Court of Appeals reversed the FCC's ruling, in part, finding that the cable modem service was part "telecommunications service" and part "information service" -- where the transmission component of the service was deemed a telecommunications service. But, upon further appeal, in *National Cable & Telecommunications Association v. Brand X Internet Services* (2005), the U.S. Supreme Court overruled the Ninth Circuit decision in this regard. Although the U.S. Supreme Court agreed with the Ninth Circuit Court that the relevant statutory definitions were vague and ambiguous, the U.S. Supreme Court upheld the FCC's interpretation of the statute under the judicial doctrine known as the *Chevron* doctrine.⁷ Under this doctrine, an administrative agency's interpretation of an ambiguous statute is entitled to deference. As a result, the U.S. Supreme Court gave deference to the FCC's classification of cable modem access service as an information service.

⁷ This doctrine arose from the landmark case, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984).

After the U.S. Supreme Court ruling in *National Cable & Telecommunications Association v. Brand X Internet Services*, the FCC – still under a majority of Republican commissioners – addressed the resultant asymmetry in service classification between DSL and cable modem access to the Internet. In *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities* (2005), the FCC reclassified DSL Internet access services as information services. In conjunction with this *Wireline Facilities Order*, the FCC also adopted an *Internet Policy Statement*, offering guidance for its approach to the Internet and broadband that is consistent with Congressional directives under the Telecommunications Act of 1996.⁸

The FCC twice attempted to enforce the principles of this *Internet Policy Statement*, while maintaining classification of both cable and wireline broadband access services as information services. First, in 2007, *In re Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, the FCC censured Comcast for interfering with its subscribers’ (of Comcast high-speed Internet) use of peer-to-peer networking applications. Second, in 2010, the FCC adopted an *Open Internet Order* under a Democratic majority of commissioners. This order adopted rules to govern non-discrimination online, consisting of transparency, no blocking, and no unreasonable discrimination.

In two opinions, *Comcast v. FCC* (2010) and *Verizon v. FCC* (2014), the D.C. Circuit Court of Appeals identified legal flaws in these two FCC orders, which had asserted FCC jurisdiction under analysis grounded in classification of BIAS as an information service. Importantly, the D.C. Circuit Court held that the FCC could not impose common carriage-type requirements (e.g. non-discrimination rules) on BIAS service when they are classified as information services. However, the Court did uphold the transparency rule adopted in the *Open Internet Order*.

Given these D.C. Circuit Court opinions, a Democratic majority of FCC commissioners opened yet another proceeding in 2014, reassessing its authority over BIAS services. This culminated in the FCC’s *Open Internet Order* (2015). In the *2015 Open Internet Order*, relying on the analysis provided in *Cherry & Peha* (2014), the FCC classified BIAS as a

⁸ This *Policy Statement* adopted four principles to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers: that consumers are entitled to access the lawful Internet content of their choice; that consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement; that consumers are entitled to connect their choice of legal devices that do not harm the network; and that consumers are entitled to competition among network providers, application and service providers, and content providers.

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telecommunications service – that is, as a common carriage service under Title II. It also created Open Internet Rules that apply to wireline and wireless providers, and established a “no unreasonable interference or unreasonable disadvantage standard” for Internet conduct to be evaluated on a case-by-case basis. Given that the Open Internet Rules were grounded on classification of BIAS as a telecommunications service, the *2015 Open Internet Order* was upheld in its entirety upon judicial review by the D.C. Circuit Court of Appeals in *US Telecom Association v. FCC* (2016).

As a result of the November 2016 federal elections, the Republican Party controlled the Presidency, a majority in both the House and Senate of Congress, and a majority of the FCC commissioners. The Republican majority of FCC commissioners then sought to reverse the *2015 Open Internet Order*. In May 2017, the FCC opened a Notice of Proposed Rulemaking (NPRM), titled “In the Matter of Restoring Internet Freedom.” Pursuant to this NPRM, the FCC adopted an order in December 2017, often referred to as the *Restoring Internet Freedom Order*, which reclassified BIAS service as an information service, reversed the FCC’s *2015 Open Internet Order*, and repealed most of the *2015 Open Internet Rules*. Numerous lawsuits have been filed challenging the *Restoring Internet Freedom Order*, which have been consolidated in an appeal pending before the D.C. Circuit Court of Appeals (*Mozilla v. FCC*). Thus far, the U.S. Congress is divided as to how to resolve the matter legislatively. On April 10, 2019, the U.S. House of Representatives under a Democratic Party majority passed the Save the Internet Act, which would reclassify BIAS as a telecommunications service and impose requirements that were adopted by the FCC in the *2015 Open Internet Rules*. However, on the same day, the Republican Senate majority leader, Mitch McConnell, declared this legislation to be “dead on arrival” in the U.S. Senate.

Importantly, the *2017 Restoring Internet Freedom Order* not only limited the FCC’s jurisdictional authority to Title I. In this order the FCC also preempted any State or local government measures that would effectively impose rules or requirements that the FCC preempted or decided to refrain from imposing under this order. (The *2015 Open Internet Order* contained no comparable provision of preemption.) As a result, this preemption *also* significantly disrupts states’ regulatory authority under the longstanding, historical dual jurisdictional (joint federal-state) regulatory framework applied to telecommunications services in the U.S. In response, twenty-two state attorneys general filed appeals challenging the *2017*

Restoring Internet Freedom Order, which have been consolidated with all other parties' appeals in the case now pending before the federal D.C. Circuit Court of Appeals. In addition, some states have introduced and/or passed legislation to impose their own network neutrality requirements, essentially inviting judicial litigation to test the validity of the FCC's preemption of state jurisdictional authority.

Service Classification of VOIP

The legal battle over service classification has expanded to other services: wireless messaging services, and voice-over-Internet Protocol services (VOIP). As for wireless messaging services, in December 2018, under a Republican majority, the FCC declared that two forms of wireless messaging – Short Message Service (SMS) and Multimedia Messaging Service (MMS) – are information services and are not commercial mobile services subject to common carriage under Title III of the Communications Act.⁹

As for VOIP services, the battle over service classification has been more complex, as there are significant functional differences among providers' offerings of VOIP services. To understand the legal status of this battle, examination starts with review of several important FCC orders released in 2004. First, in February of 2004, the FCC determined that the VOIP service provided by pulver.com's Free World Dialup (FWD) is an unregulated information service subject to the FCC's jurisdiction under Title I. A critical reason for this determination is that FWD "members must have an existing broadband Internet access service as Pulver does not offer any transmission service or transmission capability" (*Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service*, 19 FCC Rcd at 3309 (2004)). In other words, Pulver's service does not provide the technical functionality of a telecommunications service; rather, a customer of FWD must obtain the technical functionality of transmission from another, third-party provider.

Second, having reached a determination in the specific case of Pulver's VOIP service, shortly thereafter in March of 2004, the FCC commenced a proceeding (Notice of Proposed

⁹ In her dissenting statement, Democratic Commissioner Jessica Rosenworcel challenged the rationale espoused by the Republican Commissioners, characterizing this decision as doublespeak: "Today's decision offers consumers no new ability to prevent robotexts. It simply provides that carriers can block our text messages and censor the very content of those messages themselves. Calling this decision anything else is just doublespeak."

Rulemaking), *IP-Enabled Services* (2004), to address classification of VOIP services generally. As of 2019, this proceeding is still pending.

Third, in April of 2004, the FCC clarified that AT&T's specific service, phone-to-phone Internet protocol telephony service, is a telecommunications services under the Act (*In re Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, (2004)). In particular, AT&T's phone-to-phone Internet protocol telephony service provides both the technical and commercial functionality of telecommunications services; moreover, the users of this service obtain only voice transmission with no net protocol provision, and thereby the service does not have the technical functionality of an information service.¹⁰

Fourth, in *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission* (2004), the FCC found that federal law preempted state regulation of a specific VOIP service offered by Vonage. More specifically, Vonage's DigitalVoice service was a nomadic form of VOIP – where users take the service with them when they travel or move – which could not be separated into interstate and intrastate communications for compliance with Minnesota's requirements under traditional telephone company regulations without negating valid federal policies and rules. Thus, for this nomadic form of VOIP, the FCC based its preemption decision on an impossibility exception: because Vonage had no ability to distinguish its intrastate voice call traffic from its interstate traffic, it is impossible to ensure that state regulation of Vonage's intrastate traffic would not invade the FCC's exclusive jurisdiction over Vonage's interstate traffic. However, in reaching this determination, the FCC specifically declined to classify Vonage's service as a telecommunications or information service. The basis of the FCC's ruling on the impossibility exception, and not service classification, was expressly recognized upon appeal by the Eighth Circuit Court of Appeals in *Minnesota Public Utilities Commission v. FCC* (2007).

This collection of FCC rulings from 2004 constitute the state of affairs for service classification of various VOIP services – to date by the FCC. It is from this state of affairs that further litigation has transpired – but within the federal judiciary and not before the FCC. This further litigation involves the offering of fixed, interconnected VOIP service – referred to here as

¹⁰ In addition, even if there was net protocol provision, the telecommunications management exception within the definition of information service would apply. See note 4, *supra*.

I-VOIP. I-VOIP, unlike nomadic VOIP, is provided from a fixed location whereby the VOIP providers can track the geographic endpoints of their traffic. For this reason, the impossibility exception applicable to nomadic VOIP, such as the service offered by Vonage, does not apply to I-VOIP service where the divide between state-regulated intrastate voice call traffic and FCC-regulated interstate traffic is clearly defined.¹¹

The most significant – and radical – development concerning I-VOIP recently occurred in litigation related to the I-VOIP service offered by Charter Advanced Services in the state of Minnesota. The litigation began with the Minnesota Department of Commerce filing a complaint before the Minnesota Public Utilities Commission (MN PUC), claiming that Charter had unilaterally deregulated its own operations by transferring its residential telephone consumers from Charter Fiberlink to an allegedly unregulated subsidiary, Charter Advanced, and thereby significantly and negatively affected two Minnesota telephone assistance programs. Ruling on this complaint, the MN PUC found that Charter’s I-VOIP service is a telecommunications service under federal law and thereby subject to the framework of dual state and federal regulation under the Communications Act of 1934, as modified by the Telecommunications Act of 1996. Charter Advanced then filed suit in the federal district court for the district of Minnesota, seeking a declaratory ruling that its I-VOIP service is an information service under federal law. Upon cross-motions for summary judgment, in *Charter Advanced Services v. Nancy Lange* (2017), the federal district court concluded that Charter Advanced’s I-VOIP service is an information service.

The MN PUC appealed this federal district court ruling to the Eighth Circuit Court of Appeals. Notably, in its amicus brief, the FCC declined to offer a service classification for Charter Advanced’s I-VOIP service, and stated that its other cases related to VOIP obligations were sufficient guidance to address state preemption issues in the present case. The author also filed an amicus brief (Cherry 2017), explaining the flaws in the federal district court’s analysis. These flaws included: the district court’s erroneous claim that the FCC and Eighth Circuit Court of Appeals decisions related to Vonage’s nomadic VOIP service were based on classification of such service as an information service (rather, state preemption was based on the impossibility exception); the district court’s failure to properly apply the functional approach for service

¹¹ See *Universal Service Contribution Methodology*, 21 FCC Rcd 7518, 7536 par. 34 (2006), *aff’d in relevant part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

classification required under the federal statutory definitions of telecommunications service and information service; the district court's failure to recognize a critical factual difference between Vonage's nomadic VOIP and Charter Advanced's I-VOIP service, in that the latter includes provision of the technical functionality of transmission that constitutes "telecommunications"; and thus, under the facts of this case, the federal district court should have concluded that Charter Advanced's I-VOIP service is a telecommunications service, not an information service.

In September 2018, the Eighth Circuit Court of Appeals issued its opinion in *Charter Advanced Services v. Nancy Lange* (2018). The majority (2-1) upheld the federal district court ruling, finding that Charter Advanced Services' I-VOIP service is an information service under federal law, and is thereby preempted from Minnesota state regulation. In a dissenting opinion, J. Grasz stated that he did not believe that the net protocol conversions of Charter Advanced's service qualify as an information service under the federal Communications Act, and would reverse the district court's conclusion that federal law preempts state regulation of Charter Advanced's I-VOIP service. Moreover, he stated: "In my view, the net protocol conversion in Charter's service makes it either a telecommunications service or something entirely outside the primary categories of services in the Communications Act. The one thing it cannot be is an information service." The MN PUC filed a petition for rehearing en banc before the Eighth Circuit Court of Appeals; however, it was denied in December 2018.

The majority ruling by the Eighth Circuit Court of Appeals in *Charter Advanced Services v. Nancy Lange* is the first decision by any federal Circuit Court of Appeals determining the service classification of an I-VOIP service. Although this case concerned litigation in Minnesota, the Eighth Circuit Court of Appeals is binding precedent on subsequent cases before federal courts within the Eighth Circuit (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota). Moreover, although not binding precedent on other federal Circuit Courts of Appeals, other Circuit Courts may be influenced by the Eighth Circuit Court ruling.

Given the significance of the Eighth Circuit Court of Appeals ruling, on May 3, 2019, the Minnesota Attorney General, on behalf of the MN PUC, filed a petition of certiorari with the U.S. Supreme Court. The petition stated that this case presents the following questions for U.S. Supreme Court consideration: (1) whether, in the absence of an FCC decision classifying VOIP service as an information service, FCC policy can conflict with and preempt state regulation of VOIP service; and (2) whether VOIP service is a telecommunications service or an information

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service, under the appropriate functional test for classification determinations from *National Cable & Telecommunications Association v. Brand X Internet Services* (2005). Whether the U.S. Supreme Court will grant this petition and hear the appeal remains to be determined.

Conclusion

The legal battle over service classification under the Communications Act has become the means through which BIAS providers and now VOIP providers have sought to avoid federal and state regulation. If the Eighth Circuit Court of Appeals ruling in *Charter Advanced Services v. Nancy Lange* stands, providers of I-VOIP service will be emboldened to manipulate technical aspects of providing voice service, as did Charter, for the purpose of avoiding regulation. Similar rulings by other federal Circuit Courts of Appeals, if unchecked by the U.S. Supreme Court or Congressional legislation, could lead to a de facto repeal of telecommunications service regulation nationwide as providers progressively pursue technical manipulations to evade regulation. As for potential governance of the “Internet of Everything”, it is critical that discussion proceed from awareness of this U.S. legal landscape and context, which affects not only U.S. regulation but also U.S. participation in or impact on international governance developments.

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