A DIGITAL AGE COMMUNICATIONS ACT PARADIGM FOR FEDERAL-STATE RELATIONS

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INTRODUCTION 322
I. BACKGROUND 324
II. ALTERNATIVES TO AN INTEGRATED REGIME 326
A. Unconstrained State and Local Regulation 326
B. Preempted State and Local Regulation 329
III. AN INTEGRATED REGIME OF FEDERAL AND STATE AUTHORITY 332
A. Rate Regulation 332
B. Competition Policy 336
1. The No Delegation Model 339
2. The Limited Delegation Model 340
C. Consumer Protection and Social Policy 342
IV. THE ROLE OF LOCALITIES IN TELECOMMUNICATIONS REGULATION 344
A. Rights-of-Way Access and State and Local Regulation 344
B. Video Franchises 347
1. The Past As Prologue? 347
2. The Cable Franchising Process 349
3. A New Way Forward 350
C. Municipal Entry 353
D. State and Local Taxation 354
CONCLUSION 354
APPENDIX A: MODEL PROPOSED LEGISLATIVE LANGUAGE 356

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INTRODUCTION

Drafting a statute that addresses the challenges posed by "digital age" communications requires thoroughgoing revision to the traditional role for not just federal, but also state regulation. The traditional "separate and dual" regulatory authority dating back to the Communications Act of 1934, and even the hybrid approach of the Telecommunications Act of 1996, must give way to a more consistent, principled appreciation for the purposes of administrative regulation and the technological realities of modern networks.

This article flows out of a Working Group report of the Digital Age Communications Act (DACA) project, in which various experts from around the country have examined and proposed solutions to pressing issues in communications reform. The overall DACA regulatory framework, which is rooted in competition policy,[1] calls for a reconception of the roles of both federal and state regulators.

First and foremost, the Working Group endeavored to follow DACA's paradigm shift from "legislative regulation" to "rule of law regulation." By this, the Working Group envisioned that telecommunications regulation – at whatever governmental level – would follow a more formal, largely adjudicatory method in accord with pre-announced legal standards and rules. The current legislative regulation model, by contrast, operates within the broad, undefined mandate of the "public interest" standard that lends itself to legislative-type rulemakings, informal procedures and murky compromises. A rule of law regulation model is better suited to a competitive environment, promotes investment (because of its regularity and predictability), and limits rent-seeking opportunities because its process is less open-ended and indeterminate.

Second, the Working Group reallocates the respective duties and powers between federal and state regulatory entities. In line with DACA's basic premises and current policy trends, the overall structure and direction of communications regulation outlined in this report is federal. This orientation reflects the need for a unitary regulatory framework that matches the technological reality of competitive, geographically unconstrained, packet-based networks. Likewise, the emphasis on a single federal framework reflects our judgment that communications policy should be a subset of general competition policy, which largely resides at the federal level. Finally, a single overarching federal framework is necessary to avoid patchwork regulation and

1. *See* PROGRESS & FREEDOM FOUND., PROPOSAL OF THE REGULATORY FRAMEWORK WORKING GROUP RELEASE 1.0 (2005), http://www.pff.org/issues-pubs/other/050617regframework.pdf.

spillover effects from state regulation.

In developing our report, the Working Group received a wide array of input, including contributions from a session of the National Association of Regulatory Utilities Commissioners. With that input, and with further deliberation among the Working Group members, we revised our earlier work[2] and have finalized our report. In so doing, we both refine some of our earlier conclusions and add some additional points specifically related to local government regulation of telecommunications services.

In this report, the Working Group proposes the following framework for state and local regulation in three broad areas:

Rate Regulation—States initially will retain the authority to keep a basic local residential service rate. All other state rate regulation and the attendant regulatory mechanisms, however, will be preempted in favor of a general competition policy mandate superintended by the Federal Communications Commission (FCC or Commission). The recommended statutory language contains a petitioning process whereby even this rate will fade away unless the FCC finds evidence of "unfair competition" pursuant to DACA's Title I—Regulatory Framework.

Competition Policy Adjudication—The Working Group is split on this issue. Some Working Group members prefer that all unfair competition adjudication take place under the auspices of the FCC and that states be precluded from acting as competition policy adjudicators. Other members hold that the FCC should have the discretion to delegate "unfair competition" adjudications based on allegations occurring *entirely within* a state to the relevant state commission.

Consumer Fraud and Other Issues—The Working Group is largely content with the current allocation of these duties, where the states may act consistently with a federal standard. The Working Group, however, prefers a more exacting standard than now exists under Section 332 of the Communications Act because it wants to prevent "spillover" effects from overzealous state regulation in the name of consumer protection. State authority to engage in "consumer protection" will thus be confined to "unfair or deceptive practices" under the Federal Trade Commission (FTC) Act model. In addition, the proposed legislation would delegate to states and localities authority to promote public safety and homeland

2. For the initial version of the Working Group's report, *see* PROGRESS & FREEDOM FOUND., PRELIMINARY REPORT OF THE WORKING GROUP ON FEDERAL-STATE FRAMEWORK RELEASE 1.0 (2005), http://www.pff.org/issues-pubs/books/050721daca-fed-state-report.pdf.

security and to manage public rights-of-way, subject to federal law and other constraints. New franchises are eliminated in favor of granting states discretion to impose streamlined, statewide certification requirements. Any state fees for access to rights-of-way would be limited to the costs of such access.

In essence, the Working Group concludes that federal law should set forth a coherent framework that circumscribes the role of state and local authorities so as to advance sound competition policy goals. In so doing, it recognizes that a basic local service rate retains both political and practical appeal during the initial stages of communications reform. Similarly, the Working Group believes that current state alternative dispute resolution procedures and other processes for solving consumer fraud problems work reasonably well. The group therefore retains these delegations as a matter of statute, but makes clear that state consumer protection efforts cannot spillover into adjacent jurisdictions or be used as a pretext for economic regulation.

In developing this framework, the Working Group endeavored to reach a reasonable consensus among its members as to how to develop a strategy for implementing the basic vision of the Digital Age Communications Act. Ultimately, however, no Working Group member or co-chair agreed with all aspects of this approach, although all agreed that it improved upon the Telecommunications Act of 1996's allocation of jurisdictional authority. Where possible, we highlight notable areas of agreement and the logic behind different trade-offs made by the Working Group. Notably, in the case of whether to delegate competition policy administration to state agencies, we could not reach a final resolution and set forth two alternative approaches.

I. BACKGROUND

Telecommunications regulation raises both substantive and institutional questions. All too often, however, policymakers focus on the substantive questions—say, what standards to use to justify competition policy measures—at the expense of a more careful evaluation of the institutional mechanisms they might chose to advance those goals. In the case of the responsibilities assigned to federal, state, and local entities, the lack of careful thinking in developing the Telecommunications Act of 1996 led to legal uncertainty, tension between the different governmental authorities, and continuing litigation.

A thoughtful and practical framework for federal, state and local relations in this context must address two primary considerations.

First, the framework must decide the degree to which federal, state and local authority should derive from an integrated national scheme or, alternatively, from distinct schemes that govern each separate jurisdiction. This degree of integration can be calibrated, among other ways, through (1) federal preemption of state or local regulation; (2) delegations of authority, possibly in nuanced ways that would require state and local regulatory authority to conform to federal legal rules; or (3) "savings clauses" protecting state or local autonomy from federal interference. Notably, a typical savings clause preserves authority "not inconsistent" with a law's regulatory goals. In this respect, the tradition of preserving state rate-making authority represents a notable departure from an integrated framework insofar as it prevents the FCC from setting policy related to "intrastate rates."

Second, the framework must address, in a self-conscious manner, the scope of state and local authority with respect to so-called "social policy goals" that are distinct from potential economic regulation. These goals may pertain to such things as consumer protection, public safety, homeland security and management of public rights-of-way. With respect to obligations imposed on providers to address social policy goals, an ideal framework would allow for some diversity and experimentation while precluding spillover effects or inconsistencies with federal law.

In the Telecommunications Act of 1996, Congress adopted what might be generously termed "a hybrid strategy." As to its mission of opening local markets to competition (accomplished through the regulation of interconnection and wholesale markets), Congress provided the FCC with residual authority to oversee all aspects of this regulatory program, inviting state agencies to interpret and implement federal regulatory policy. At the same time, Congress left intact the traditional protection of state regulatory authority codified by section 2(b) of the 1934 Communications Act. With respect to developing standards for economic and social policy matters, Congress largely elided over this distinction, leaving unsettled numerous matters related to the respective roles of state and federal agencies and paving the way for litigation and legal uncertainty.

The advent of digital technologies in general and the Internet, in particular, continue to undermine the legal distinctions embodied in the 1996 Act. On account of the Internet's transformative effect on communications markets and the clear trend of technological convergence, the historic distinctions between interstate and intrastate services are evaporating. Moreover, given that Internet services—such as Voice over Internet Protocol (VoIP)—are national (and even international) in scope, there are increasing risks associated with allowing states to regulate telecommunications outside a unifying federal regulatory regime. For social policy concerns, however, there is an increasing recognition that matters ranging from universal service concerns to consumer fraud to E-911 and emergency services will require the involvement of state and local authorities, even if some national standards will be appropriate and necessary.

This Report, anticipating that the current Internet developments are only the beginning of a massive transformation in communications markets, proposes a new charter for federal, state, and local cooperation under a Digital Age Communications Act (DACA). This charter, as suggested above, would explicitly integrate federal and state authority, thus replacing the 1996 Act's less-than-self-conscious approach and its retention of section 2(b). Moreover, this charter would make clear, with important limitations, that state agencies should be given greater solicitude on matters of social policy than on economic policy. It is envisioned that this approach will facilitate thoughtful policy decisions that would be made by the actor in the best institutional position to do so.

II. ALTERNATIVES TO AN INTEGRATED REGIME

Before explaining the virtues and powerful rationale for an integrated regulatory system, we will first outline its two polar alternatives: (A) the historic system of separate and dual authority; and (B) a federal preemption model. For the reasons explained below, we found each alternative lacking in fundamental respects. Though we present these alternatives as polar opposites, we do not mean to present a false dichotomy or a means to make our integrated model more respectable. (Indeed, some members preferred the preemption option with respect to competition policy issues.) Rather, the poles of preemption, on the one hand, and separate and dual authority, on the other, serve to illustrate the conceivable models for a federal-state framework going-forward.

A. Unconstrained State and Local Regulation

Since the enactment of the Communications Act of 1934, federal telecommunications law has emphasized that state agencies must be permitted to regulate "intrastate" telecommunications services. Indeed, Congress enacted section 2(b) of the 1934 Act[3] to reverse the Supreme Court's decision in the so-called *Shreveport Rate Case*,[4] which provided broad authority to the Interstate Commerce Commission to regulate

3. This section reads "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ." 47 U.S.C. § 152(b) (1934).

4. Houston E. & W. Tex. Ry. Co. v. United States [hereinafter *Shreveport Rate Case*], 234 U.S. 342 (1914).

telecommunications.[5] In particular, the *Shreveport Rate Case* concluded that the Interstate Commerce Commission could regulate intrastate telephone service because of its effect on interstate commerce.[6]

To limit the scope of federal authority, the 1934 Act instituted what has become known as a "separations" model, under which states are free to regulate the so-called "intrastate" aspects of communications unless it would be "impossible" to separate those aspects from interstate services. From 1934 to 1996, regulatory agencies and the courts frequently considered where to draw the line between federal and state authority,[7] with the United States Supreme Court ultimately setting forth the logic and requirements of the separations model in 1986 in *Louisiana PSC v. FCC*.[8] In so doing, the Court recognized that the 1934 Act's regime was unstable, noting "while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres . . . in practice, the realities of technology and economics belie such a clean parceling of responsibility."[9]

In the 1996 Act, Congress did not address clearly the jurisdictional relationship between federal and state authority, leading to a round of litigation as to whether the classic model of separated authority applied to the initiative of promoting local competition through the regulation of interconnection and wholesale markets. In *Iowa AT&T v. Utilities Board*, the Supreme Court made clear that the 1996 Act's new requirements followed what is generally referred to as "cooperative federalism."[10] Nonetheless, the 1996 Act left section 2(b) in place, allowing state agencies to maintain complete control over "intrastate" services. This regime, as the Supreme Court's *Louisiana PSC* decision anticipated, has faced constant pressure from a dynamic marketplace whose services increasingly do not follow geographic boundaries. Thus, for this model to function going forward, federal and state regulatory authorities would need to develop a re-energized use of a "separations process" that, among other things, would allocate jointly used resources

5. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 372 (1986) ("[Section 2(b)] was proposed and supported by the state commissions in reaction to what they perceived to be the evil of excessive federal regulation of intrastate service such as was sanctioned by the *Shreveport Rate Case*.").

6. *Shreveport Rate Case*, 234 U.S. at 353.

7. *See, e.g.,* N.C. Util. Comm'n v. FCC, 537 F.2d 787, 793-95 (4th Cir. 1976) (upholding FCC preemption of state regulations that would impede implementation of federal CPE interconnection requirements).

8. 476 U.S. 355 (1986).

9. *Id.* at 360.

10. 525 U.S. 366 (1999). For a description of cooperative federalism in the context of the 1996 Act, *see* Philip J. Weiser, *Cooperative Federalism, Federal Common Law, and the Enforcement of the Telecom Act,* 76 N.Y.U. L. REV. 1692 (2001), *available at* http://lawweb.colorado.edu/profiles/pubpdfs/weiser/CoopFederalism.pdf.

between the two jurisdictions in a manner fit for a technologically dynamic era.[11]

Advantages. Creating a zone in which states can regulate unconstrained by federal law has certain advantages. Along the lines that motivated the enactment of section 2(b) in 1934, a separations model respects the longstanding tradition of a separate sphere for non-federal regulation and thus adheres to the ideal of a "dual federalism." Moreover, this approach seeks to minimize the degree of coordination (and thus litigation or other conflict) between state and federal regulators because such coordination would be limited primarily to managing the separations process. In so doing, this approach emphasizes the value of state experimentation in developing local solutions and remaining accountable for their success (or failure). This approach both minimizes the risk of a single suboptimal national policy and facilitates the development of optimal regulatory solutions that can be adopted nationwide.

Disadvantages. The separations model also involves significant disadvantages. Although this model respects the value of state autonomy, it downplays the importance of interstate spillovers that are often better addressed through national regulation. In particular, for industries like communications that substantially involve activities that cross city and state lines, it is often difficult to preserve an independent regulatory sphere for states and localities to regulate outside of a federal regulatory framework.

The evolution of modern communications technology continues to undermine the case for state autonomy and bolsters that of the value of national oversight as an aspect of interstate commerce. As former California PUC Commissioner Susan Kennedy put it, "[t]he interstate nature of many emerging communications technologies argues strongly for a national regulatory framework."[12] In particular, multiple technological trends are eroding the once clear distinction between local and long distance services: the cost of communicating is becoming more distance insensitive; geographic boundaries are irrelevant to emerging technology; intelligence and functions are migrating away from the central office (the delocalization of the central office); the relevant

11. The FCC has largely declined to address the challenges in reforming the separations process for a new technological era. *See* Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking*, 12 FCC Rcd 22,120, 22,126 (1997) (noting that "today's network architecture and service offerings differ in many important ways from the network and services" that spawned current separations process, constructed at a time when services were provided "through a regulated monopoly").

12. Susan Kennedy, Federal and State Regulatory Responsibilities in a National Communications Market 1 (2005) (unpublished manuscript, available at http://www.naruc.org/associations/1773/files/LTF_susankennedypaper.pdf).

networks as well as the services that ride on these networks are increasingly comprised of numerous component parts (e.g., those offered by different providers); packet-routed networks are becoming more prevalent than circuit-switched networks; and the application (e.g., voice) is becoming more independent and separate from the network.[13]

In sum, the ability to regulate intrastate services distinctly from interstate ones is increasingly difficult to sustain with respect to digital age communications networks, which increasingly revolve around the Internet and wireless technologies. As the FCC stated in concluding that Vonage's Voice over Internet Protocol offering was subject to federal jurisdiction, communications services are increasingly "designed to overcome geography, not track it."[14] Thus, any attempt to allow states and localities to try to "isolate" and then regulate aspects of these services risks distorting or impeding the evolution of modern communications networks as well as creating significant spillover effects. Finally, the competition policy maxim of promoting competition, not individual competitors is not always grasped by state regulators (or federal ones for that matter).

B. Preempted State and Local Regulation

For industries that are national in character and involve interdependent services, Congress often adopts a national regulatory regime that leaves no role for state administration. Such regimes, ranging from the regulation of retirement benefits (in ERISA) to airlines (in the Airline Deregulation Act of 1978), place a high value on uniformity and predictability, thereby discounting the possibility that local administration could produce better results either through closer proximity to consumers or the possibility of experimentation with distinct approaches. In telecommunications, there are only limited elements of a preemption strategy, such as the 1996 Act's categorical stance against state-created barriers to entry.[15]

Advantages. The advantages of the preemption model mirror the disadvantages of the unconstrained model and vice-versa. The preemption model gives full weight to national policy to set forth a uniform policy and process to govern all communications networks and services, regardless of boundaries. By providing such uniformity, this

13. Douglas C. Sicker, *The End of Federalism In Telecommunications Regulation?*, 3 NW. J. OF TECH. & INTELL. PROP. 130 (2005), *available at* http://www.law.northwestern.edu/journals/njtip/v3/n2/3.

14. Vonage Holding Companies Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion & Order*, 19 FCC Rcd. 22,404, ¶ 25 (2004).

15. *See* 42 U.S.C. § 253 (1996).

model would seek to maximize regulatory certainty and promote investment and innovation in new, cross-boundary networks and services. Moreover, the preemption model arguably eliminates the need for coordination among federal, state and local regulators, thus avoiding the complexities of separations.

A preemption model can overcome certain parochial interests that tend to take root with state regulation. Though there is not an entirely clear answer as to where consumer-harming rent-seeking is more pervasive, a casual survey of state regulatory activity – from airlines, to intrastate trucking, to motor vehicle dealers, to various professional licensing schemes – suggests that state regulation can be more easily and cheaply turned to benefit private, rather than public, ends. This is not to say that federal regulation is devoid of rent seeking. The history of the FCC itself belies such a claim. Nonetheless, the opportunities for forum shopping and costly state-by-state regulatory lobbying campaigns appear to be lessened, or at least refocused, in a preemption model.

There is also historical precedent recommending state preemption. Preemption of state regulation under a uniform deregulatory federal scheme resulted in large consumer welfare gains in other network industries: airlines, trucking, railroads and natural gas production. In those cases, preemption allowed the interests of consumers to triumph over the interests of regulated industries, which often act as the fiercest defenders of state regulation because the regulation can be turned to their advantage.

Disadvantages. Preempting state and local regulation downplays the values of regulatory federalism. By wresting power from states, this approach would disrupt state resources already devoted to telecommunications regulation, thereby generating dislocation and a significant re-orientation in telecommunications policy. This shift of authority would downplay the value of the states' institutional competencies and underestimate the challenges that would arise from the lack of federal resources and competencies to address all circumstances in which government involvement might be warranted. In particular, state agencies are already using administrative law judges and adjudicative-like procedures (along the lines envisioned by the Regulatory Framework set forth in Title I) more effectively than the FCC. Finally, a preemption approach precludes states and localities from experimenting with different regulatory solutions, even where state and local involvement may aid (or at least not hinder) the achievement of federal policy goals.

If the nature and conditions in telecommunications markets were relatively uniform, say, along the lines of airline safety standards, a preemption approach would not raise many of the above concerns. But, in reality, the economics of telecommunications networks underscores that their rollout and use—along with the associated competitive consequences—differs between jurisdictions. In particular, given the notable variations in population density and economic wherewithal across the U.S., the relevant marketplace fundamentals are likely to differ considerably. Indeed, despite the impact of wireless and broadband technologies, the cost characteristics of local networks will remain distance and terrain sensitive for the foreseeable future. Consequently, this view holds that sound regulation will require sensitivity to local conditions that can best be achieved through a continued reliance on state and local authorities. Notably, a belief that states can effectively recognize and implement competition policy standards consistent with local conditions rests on an assumption of the competence and fidelity of state commissions toward a "rule of law" regulatory model. This relies on an empirical judgment about state regulatory commissions' respective abilities and histories, which given a wide variance in performance, is not indisputably clear.

Despite the appeal of a federal regulatory framework, the rationale for a continued state role cannot be ignored. The conditions that allowed for broadly preemptive federal roles in other network industries are not present in communications. For one, in no industry, save communications, has the state role in rate regulation—and specifically rate regulation in pursuit of "universal service" goals—been so pervasive. This means that state reliance interests remain strong for some continued regulatory role. The ultimate question is whether states have the capacity and ability to act to enhance consumer welfare under a competition policy framework. This requires a predictive judgment about the ability of state regulation to transform from a legislative regulator to a rule of law regulator.

The ability of states to transition to a regime guided by rule of law values colors one's enthusiasm for a more preemptive or integrated regime. Significantly, however, the preemptive model is not free from criticism on this ground, as there is reason to believe that the FCC cannot be easily transformed from a legislative to a rule of law regulator. In particular, the legislative regulation model the FCC now follows has a large constituency supporting it and it will not die without a fight. Accordingly, the predictive judgment as to which regulatory institutions can make the transition to a rule of law model more effectively is not immediately clear, meaning that involving states in competition policy judgments provides the important benefit of enabling diverse institutions to make the transition to a rule of law model at the same time and to create benchmarks for one another to follow (or avoid).

III. AN INTEGRATED REGIME OF FEDERAL AND STATE AUTHORITY

The most significant debate among Working Group members focused on a choice between establishing an integrated regime of federal, state and local authority or, alternatively, broad preemption of state and local regulation. Such broad preemption no doubt would eliminate many of the shortcomings arising from the current statute's attempt to divide federal, state and local authority into separate spheres. Broad preemption also, however, would ignore the strong interests, institutional competencies and other practical considerations weighing in favor of some ongoing state and local involvement.

Upon reflection, the Working Group concludes that a self-conscious commitment to an integrated regulatory framework would best promote sound telecommunications policymaking. Under such a model, states and localities would be permitted to regulate only within spheres authorized by the federal government. This authority involves both an explicit delegation of authority—as exists, for example, under the 1996 Act's interconnection agreement regime[16]—and a tolerance (through a "savings clause") for states to act in ways that do not affect other states and are "not inconsistent" with federal regulatory policy.[17] In essence, this model reflects a "cooperative federalism" strategy that involves federal, state and local regulators in implementing broad federal policy goals.[18] As outlined in the introduction, we envision three distinct approaches for addressing (A) the extent to which state agencies should continue to set local "intrastate" rates; (B) whether and how states should help manage competition policy other than rate regulation (e.g., interconnection); and (C) how much discretion state agencies should enjoy in protecting consumers as well as addressing social policy goals. We will address each in turn.

A. Rate Regulation

The historic role played by section 2(b) of the Communications Act of 1934 was to protect state authority from federal oversight. During an era when the separation of responsibility between federal and state

16. *See* 42 U.S.C. §§ 251, 252 (1996).

17. *See* 42 U.S.C. § 261(c) (1996). This proviso states: "Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."

18. For a thorough discussion of cooperative federalism regulatory regimes, see Weiser, *Cooperative Federalism, Federal Common Law, and the Enforcement of the Telecom Act, supra* note 10, *passim*; Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663 (2001); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999).

authority could be managed reasonably well, this approach enabled state agencies to maintain their authority over an island of "intrastate rates." This model, however, is not built for an era of Internet Protocal (IP)-enabled services where different broadband facilities support bundled offerings of services that—even for the once "local telephone service"—routinely cross state boundaries and are intricately related with one another. Consider, for example, that with the rapid declines in transport costs, many competitive providers are already relying on switching equipment far from the local calling area in question. In a world where the geographic endpoints of a call can be easily determined (as was the case in the traditional circuit switched environment), the classification of intra-state versus inter-state services could be accomplished without much difficulty (regardless of how the call was routed). But with the advent of IP services (such as Voice over Internet Protocol) and an increasing reliance on wireless networks, the location of one or both ends of a telephone call is increasingly difficult to determine.

In calling for the abolition of the section 2(b) approach, we are mindful that state oversight of ratemaking questions has played an important role in telecommunications policy. In particular, state authorities have undertaken local fact-finding and have addressed concerns about the reasonableness of the rates charged for telecommunications services on a market-by-market basis and whether they are constrained by local competition. Moreover, we recognize that many state legislatures and state agencies are thoughtfully re-examining the merits of continued rate regulation for markets increasingly characterized by competitive entry.

The Working Group is also mindful of the damage that overextended state rate regulation can cause. In most states, the rate structure did not derive from any measure of the cost of a given service, but rather as part of a universal service scheme. Thus, state rates were, and often remain, geographically averaged without regard to cost, as well as pervaded by cross-subsidies benefiting rural and residential consumers and burdening urban and business consumers. In turn, this rate structure offered distorted price signals to new market entrants in the wake of the Telecommunications Act of 1996. Accordingly, the state-regulated rate structure induced upstream distortions in the regulated wholesale rate structure until there was little hope of discovering a "market" price anywhere in the communications sector. A truly competitive, market-driven communications market will thus eschew rate regulation at both the retail and wholesale level, unless absolutely necessary.

The Working Group embraces a two-prong approach to rate regulation. First, for the most part, all future rate regulation is lifted and heretofore impermissible.[19] Second, as an initial matter, rate regulation of basic local services that fall within the definition of a service supported by universal service under Section 254(c) of the 1996 Act—i.e., are viewed as essential utility type services—are grandfathered until the conclusion of state and federal proceedings to determine whether such rate regulation is justified in specific markets.[20]

The Working Group sees the initial retention of a basic service rate as a concession to immediate practical and political considerations, and therefore we also enact a petitioning process whereby this rate may also be ended in favor of a market process. Specifically, for the grandfathered basic services eligible for continued rate regulation, the Working Group proposes a mechanism for parties to petition for either the lifting of current regulation or the imposition of new regulation. In particular, any petition to reform current rate structures must be filed with the relevant state agency. That agency will have 270 days to act on this petition, and to determine whether its regulatory regime is consistent with DACA's Title I unfair competition standard, before it is deemed granted. Whether the petition is denied, granted by a decision, or granted by operation of law, any party can appeal such an outcome to the Federal Communications Commission. In the event that a party appeals a state agency's decision, the FCC will have 180 days to determine whether or not the presence or absence of state regulation is appropriate based on Title I's "unfair competition" standard. If the FCC fails to act within that time, any aggrieved party can file a petition directly with the U.S. Court of Appeals for D.C. Circuit.

In calling for an evaluation of rate regulation of basic telecommunications services based on whether it is justified under an "unfair competition" standard, we envision the development of a competition-based justification for rate regulation through a "common law-like" process involving the state agencies and the FCC. At a minimum, this process would call for real world market analyses and sensitivity to the continuing development of new forms of competition to traditional wireline telephony. That said, to the extent "unfair competition" exists in certain markets, this process would offer state agencies an opportunity to continue to perform their traditional role of protecting consumers from unreasonable rates for essential

19. The obvious exception is, as discussed below, any rate regulation justified under DACA's Title I's "unfair competition" standard.

20. The grandfathered state rate regulation for basic services and services supported under Section 254(c) is not meant to provide an ongoing lever for continued rate regulation, even if the definition of supported services under 254(c) (or its statutory successor) expands. Rather, this provision is meant to be a strict grandfathering clause. Only basic service rates in effect at the time of the passage of this DACA can remain in effect. Of course, a state on its own initiative can cease regulating this rate as well.

telecommunications services.

In recommending the approach set out above, we recognize the appeal of the alternative model of requiring all rate regulation to be lifted immediately (or within the very near term), with rate regulation being reimposed only where, when, and to the extent an aggrieved party can demonstrate consumer harm that can be remedied only by rate regulation.[21] Although this approach has much to commend it, we conclude that—particularly given the close scrutiny now being applied to most state regulatory regimes—it would cause more transitional difficulties than create consumer benefits through the lifting of unnecessary regulation. To be sure, we recognize the artificiality of many regulated rate structures, but we believe that a politically prudent, fact sensitive, and more gradual adjustment process will be a superior means of correcting unjustified rates and transitioning to a more rational regulatory strategy.

Yet another model of rate deregulation would retain the basic service rate, as the Working Group does, but sunset that rate by a date certain, thus doing away with the petitioning process.[22] The Working Group considers this a second-best alternative to the current petitioning process because it accomplishes the necessary goal of eliminating distortionary state rate regulation. However, the Working Group also believes that under a unified framework that encompasses all communications providers – large and small, urban and rural – there may be some ongoing need for continued regulation of a basic service package for certain customers still served only by a single provider. Thus, we would anticipate that most basic rate regulation would fall to the wayside under the petitioning process, but could still hold out that it might exist in small rural pockets of the country for an indeterminate time in the future.

A final model that the Working Group considered, but opted not to adopt, would preempt all rate regulation, including the basic service rate, and leave any subsidy questions (which the basic service rate represents) to a targeted universal service system. This solution has some attraction because it eliminates the ongoing distortions in the communications markets that a below-cost basic service rate represents. It further serves the goal of equity between providers because for the most part persistence of this basic service rate represents an ongoing subsidy

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21. *See* Robert C. Atkinson, Dir. of Policy Res., Columbia Inst. for Tele-Information, Report at Remedies for Telecom Recovery II: What Can the Government Do to Help Recovery? (Oct. 29, 2004), http://www.citi.columbia.edu/research/recovery2/CITI_RegulatoryUpdate04.pdf.

22. *See, e.g.,* Raymond L. Gifford & Adam Peters, *A Model State Act for Communications,* 11.21 PROGRESS & FREEDOM FOUND. PROGRESS ON POINT § 4(a)(3), at 14 (2004), http://www.pff.org/issues-pubs/pops/pop11.21modelstate.pdf.

obligation for the incumbent to its basic service customers. There is, therefore, a strong policy rationale for doing away with all rate regulation and addressing particular universal service needs for those in need through a targeted universal service program. In the end, the Working Group opted to retain the basic service rate as the necessary political tradeoff for broader rate freedom. To be sure, the pure market-driven policy perspective would eliminate all state rate regulation and only subject freely set rates to the broader competition policy inquiry. But we anticipate that the basic service rate grandfathered here will be of little importance to the broader communications market as it evolves, and that in any event it will be petitioned away in most competitive areas of the nation's market within a reasonably short period of time.

In no event does the Working Group intend this grandfathered rate to evolve forward to include new packages of services that might someday be defined as "basic." Stated simply, no new services are to be brought within the ambit of state rate regulation unless the FCC concludes that such an approach is warranted under the regulatory framework. Significantly, with respect to any *future* evidence of "unfair competition," DACA's Title I—Regulatory Framework provides considerable discretion regarding how to remedy that behavior. As to the exercise of this discretion, the Working Group presumes that a remedy of rate regulation for any service, including basic local service, would only be imposed if it was the most effective one available.

In sum, we emphasize that the general preemptive approach toward rate regulation eclipses traditional state regulatory activities except where absolutely necessary. Thus, save for a basic service tariff and local exchange maps to define that basic service area, all other traditional state regulatory activities are exchanged for the competition policy standard. Under this approach, the classic issues associated with tariff-based regulation (and the concomitant protection of the filed-rate doctrine), such as rate cases, cost allocation proceedings, cost studies and general ongoing regulatory supervision, will fall by the wayside.

B. Competition Policy

Under the Telecommunications Act of 1996, state agencies have played a crucial role in implementing the law's regulatory mandates. Unfortunately, the FCC and the state agencies have often failed to adopt a thoughtful and self-conscious approach to regulatory federalism. Rather, regulatory federalism often has served merely as another argument for parties to make opportunistically. The challenge for a new statutory framework—or even in managing the current one—is to develop a set of clear principles that do not lend themselves to continued *ad hoc* and inconsistent application.[23]

Under the FTC-like model proposed by the Regulatory Framework Working Group, there is the critical question of how to implement what are almost certainly going to be fact-specific judgments that may well, in at least some cases, benefit from local fact-gathering and experimentation. There are two possible models that can be conceived for dealing with particular competition policy implementation questions.

First, there is a model where all questions are subsumed within the federal agency. This is how the Federal Trade Commission handles "unfair competition" inquiries, through the FTC's main office in Washington, D.C. and through its regional offices. Likewise, the Federal Energy Regulatory Commission considers interstate jurisdictional electric issues using its own administrative processes and administrative officers. This model clearly makes competition policy a federal prerogative and avoids the jurisdictional wrangling that the 1996 Act has provoked. Furthermore, it follows the historical models of airline, interstate trucking and natural gas deregulation, where states were precluded from an ongoing role in regulating these industries. In so doing, it solves the problem of states sometimes acting in a capricious or parochial matter, a problem that has been identified specifically in a "new economy" competition policy context by Judge Richard Posner.[24] Finally, there are exclusive fields of federal law already, such as bankruptcy, copyright and patent law. Accordingly, making communications policy exclusively federal is not unprecedented, even with a decent respect for

23. Philip J. Weiser, *Cooperative Federalism and Its Challenges*, 2003 MICH. ST. DCL L. REV. 727, 728-29; *see also* Atkinson, *supra* note 21, at 10.

24. *See* Richard A. Posner, *Antitrust in the New Economy* 10 (Univ. of Chicago, Working Paper No. 106, 2000), *available at* www.law.uchicago.edu/Lawecon/WkngPprs_101-25/106.Posner.pdf. (As Posner explained:

> I would like to see the states stripped of their authority to bring antitrust suits, federal or state, except under circumstances in which a private firm would be able to sue, as where the state is suing firms that are fixing the prices of goods or services that they sell to the state. (In other words, only their power to bring *parens patriae* suits would be abrogated.) States do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution; in addition they are too subject to influence by interest groups that may represent a potential antitrust defendant's competitors. This is a particular concern when the defendant is located in one state and one of its competitors in another, and the competitor, who is pressing his state's attorney general to bring suit, is a major political force in that state. A situation in which the benefits of government action are concentrated in one state and the costs in other states is a recipe for irresponsible state action. This is a genuine downside of federalism. The federal government, having a larger and more diverse constituency, is, as James Madison recognized in arguing for the benefits of a large republic, less subject to takeover by a faction. I am not myself inclined to make a fetish of federalism.)

Id.

federalism.[25]

An alternative model uses state resources to help implement a unitary federal regulatory scheme. Notably, in the environmental regulatory arena, there is a regular use of state regulatory resources to supplement federal oversight. Such use of state resources is at the federal agency's sole discretion and must be within the state agency's state-authorized powers, but it is a known model within administrative regulation. Health care regulation and funding also quite often adhere to this model through a "waiver federalism" approach. Under a "waiver federalism" strategy, the federal agency sets the general guidelines and rules, but a state is free to petition the federal agency for a waiver from the general rules and implement its own program.[26]

The extent, if any, of federal delegation of competition policy authority to states proved to be the most controversial of the Working Group's issues. A contingent of the Working Group argued for keeping states out of competition policy issues altogether, fearing inconsistent outcomes, rogue decision making, and disparate processes. An equally strong Working Group contingent argued for a narrow delegation to states to hear matters specifically and solely affecting their given state. This delegation authority resurrects the old pre-DACA "intrastate" category as the defining parameter of potential state delegated jurisdiction. At the same time, a delegation strategy recognizes that states have adjudicatory systems already in place (and ones more developed than the FCC's) and that a degree of decisional heterogeneity is not an "intolerable inconsistency," but rather can sometimes provide illumination on close competition policy questions (as well as procedural strategies). Finally, proponents of some delegation authority argued that the states' adjudicatory capacity might be needed to avoid backlogs and logjams at an overburdened FCC conducting true administrative adjudication for the first time.[27]

In the end, the Working Group could not reach a conclusive determination on this issue, but instead decided to define the parameters of the choices and delineate the specific contours of a limited delegation

25. This divided Working Group should hasten to point out, however, that these exclusive federal legal enclaves of bankruptcy, copyright, and patent are matters assigned to the federal government by the U.S. Constitution.

26. Waiver federalism models are most often used in situations like Medicaid funding where the federal and state governments are using matching dollars to fund a given program. Communications regulation in the pure regulatory sense is obviously different, but there are parallels in universal service policy.

27. As the report of the Regulatory Framework working group pointed out, a separate working group is focusing on institutional reform, including proposals to modify the structure of the FCC. So, the use of the term "FCC" here and elsewhere in this report is meant only to refer to the sector-specific regulator, however it is ultimately constituted. It is not meant to imply that the agency necessarily should remain in its current form.

model.

1. The No Delegation Model

The "no delegation" model is quite simple: all competition policy questions for all jurisdictional communications providers remain exclusively within the purview of the FCC and its administrative adjudicatory arm. Thus, all claims of unfair competition would be tried and worked out before the FCC. This would include broad, interstate questions about a general "net neutrality" mandate, as well as specific questions about whether a small 100 line rural phone company was abusing a terminating access monopoly. By envisioning that the FCC would determine all such issues, this model would require some form of local FCC branch offices or provision for local determinations of such matters.

The no delegation model ensures a unitary federal regulatory scheme for electronic communications services, and avoids heterogeneous decision makers with varying policy agendas.[28] Therefore, the no delegation model should, in theory, provide more national certainty as to the competition policy rules governing electronic communications networks and also streamline regulatory costs and proceedings into a single agency (i.e., the FCC).

Similarly, the no delegation model should at the very least narrow the available forums for rent-seeking and other untoward manipulation of the regulatory process. Moving from a "legislative regulation" model to a "rule of law" regulatory model suggests an aggregate move from more to fewer decision makers and toward more adjudication and less rulemaking. These factors counsel a single, unitary regulator implementing its decisions consistently across the nation. A no delegation model accomplishes this goal.[29]

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28. This is only true of course as a formal matter. Within a single agency, there can of course be divisions and disparate agendas, most notably among professional staff and political appointees. Nonetheless, the theory of a unitary agency accountable to the president's appointees should be more likely to generate consistent outcomes than multiple state agencies, with different political allegiances and disparate competencies.

29. In fairness, it should be noted that the no delegation model also makes the FCC's faithful implementation of competition policy law and rules all the more important. Competition policy, understood as maximizing consumer welfare, still has sufficient breadth and doctrinal disputation to allow latitude to the regulator to be more or less intrusive in electronic communications services markets. It is sometimes argued that a single national rule that is bad is preferable to 50 different rules of disparate quality. This sentiment may be more a function of dissatisfaction with the current dual jurisdiction regulatory system than a considered view of what a uniform "bad" national rule might mean. One can imagine any number of catastrophic regulatory actions by an FCC disinclined toward implementing competition policy.

2. The Limited Delegation Model

The limited delegation model would be similar in concept to, but ultimately much narrower and circumscribed than, the 1996 Act's regulatory framework. Under this model, the DACA would provide an opportunity for the FCC to delegate authority to state agencies to implement its competition policy, consistent with a particular issue within a particular state. This delegation would entail several distinct elements. First, for a state agency to accept a delegation of federal authority, it would need to conclude (and the FCC would need to agree) that it enjoys legal and practical competence to administer the particular inquiry envisioned by the FCC.[30] This determination could include an evaluation of the ability of a state to follow a particular procedural approach. Such determinations would not be subject to a collateral attack or an interlocutory appeal. The use of this threshold requirement serves several purposes—(1) it ensures that state agencies are not "commandeered" into a federal regulatory program; (2) it underscores that state agencies must enjoy appropriate legal authority to implement federal law; and (3) it acknowledges that at least some state agencies may need to develop new practical abilities (say, economic and technical expertise) before taking on more challenging competition policy tasks.[31] To the extent that a state agency is either not able or willing to perform the delegated tasks, the FCC shall assume the appropriate responsibility. Because the issue delegated to a given state would have to involve just that state, the FCC could not use this delegation authority to "punt" tough issues it did not want to have to decide to the states.

To appreciate the mechanics of this approach, consider the case of an alleged terminating access monopoly being abused by a small, rural carrier within a given state. In that case, the state agency would need to conclude that it enjoyed the legal and practical ability to apply whatever competition policy-based standards the FCC developed to determine

30. This approach to delegation underscores what the Working Group considers a robust sensitivity to federalism concerns. In particular, states – and specifically state law – would have to embrace state administration (it need not necessarily be a utility or public service commission) of a federal regulatory regime. By calling for a self-conscious decision by states to accept a federal delegation, states will be able to evaluate the opportunity cost, weighting the direct cost versus the desire for control, of participating in this federal regime. For a discussion of these issues, *see* Weiser articles cited *supra* note 18.

31. For a discussion of the first two issues, *see id.* For concerns related to the latter, *see* Raymond L. Gifford, *Regulatory Impressionism: What Regulators Can and Cannot Do,* 2 REV. NETWORK ECON. 466, 477 (2003) (arguing that many state agencies "do not have the time, resources, or abilities to innovate or found new schools of competition policy"), *available at* http://www.rnejournal.com/articles/gifford-RNE_10_final.pdf. The "legal competence" prong is not a *pro forma* certification either. A robust federalism respects state law sufficiently to require states to have authorized their utility commission or other regulator under state law to participate in implementation of a federal statutory framework.

under what, if any, conditions a particular access pricing practice would be anticompetitive. By allowing a state to make and enforce its judgments, the FCC could foster creative experimentation in areas where the optimal approach was less than clear.

The second aspect of the limited delegation jurisdictional regime is the recognition that any explicit FCC delegation of authority to state agencies will often also entail some form of an implicit delegation of authority. This implicit delegation will often take the form of a "latent ambiguity"—i.e., a policy question that, although not apparent on the face of the matter, becomes clear in its application. To address such issues, state agencies would be authorized—but not required—to certify issues to the FCC for resolution. This "certification procedure" could also be used by state agencies to request flexibility not initially granted by the FCC (i.e., a waiver from the federal regulatory requirements).[32] The FCC would be required to decide such matters within 120 days and such decisions would be subject to appeal to the U.S. Court of Appeals for the D.C. Circuit. As to a state's resolution of any matter delegated to it by the FCC (either explicitly or implicitly), any party to the decision could appeal the state agency's decision to the FCC. If the FCC failed to act on such petition within a timely manner, any aggrieved party could file a petition for review with the D.C. Circuit.

To provide a mechanism for state agencies to alert the FCC of their interest in developing competition policy measures (such as the terminating access monopoly case discussed above), they would be required to first file a petition outlining the initiative in question and their reasoned basis for doing so. If the FCC failed to act on this petition within 90 days—either to endorse the measure or to bar it—the proposed proceeding would be deemed permissible. Notably, an FCC decision to allow a state to proceed to implement a competition policy measure would only imply that the FCC has made a preliminary judgment that any measure adopted by the state as a result of such proceeding is "not inconsistent" with DACA's regulatory framework. Such an FCC decision would neither immunize the subsequent state agency decision from challenge in federal district court nor prevent the FCC from later concluding that the measure in question is inappropriate. Rather, such a failure to act can be best analogized to a decision by the Supreme Court to deny a petition for certiorari, which expresses no view on the merits and leaves open the possibility that it will consider the question in a later case. Indeed, like the option to expressly tolerate

32. Such a waiver procedure is a frequently used aspect of the Medicaid cooperative federalism regulatory program. *See* Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995).

different approaches, a decision by the FCC not to embrace or reject a particular regulatory measure can serve to foster experimentation in areas that are either complex or not well understood by regulatory authorities.

We emphasize that the delegation of adjudicatory authority to state agencies and the subsequent "appellate" process through the FCC and D.C. Circuit Court of Appeals is intended to follow administrative adjudicatory procedures and to reinforce DACA's commitment to a rule-of-law oriented regime.[33] In so doing, this regime distributes adjudicatory resources to handle both a large number of cases as well as complex inquiries that will turn on specific factual determinations. Moreover, this regime ultimately unifies the relevant policymaking process through a single regulatory body (the FCC) that will often act like an appellate court (albeit subject to the oversight of the D.C. Circuit) as it develops a uniform body of unfair competition law.

In short, the case for a no-delegation or limited delegation model depends on how one judges three primary factors: (1) the relative assessment of the capabilities of states or a federal agency to act with fidelity toward a competition policy jurisprudence; (2) the level of confidence in the federal or state agencies' ability to adapt to a rule of law, adjudicatory model (as opposed to the traditional legislative model); and (3) the judgment as to whether state involvement would give rise to more benefits or harms in the administration of competition policy. As noted above, the Working Group members differed on their evaluation of these factors and thus whether a no-delegation or limited delegation model would be preferable.

C. Consumer Protection and Social Policy

Unlike competition policy matters, where our Working Group believes that the FCC should take the lead in establishing the governing policy framework, consumer protection and certain social policy concerns are more properly handled—at least in the first instance—by state agencies. As Commissioner Kennedy put it, "federal regulators would never be equipped to accept millions of calls from individual customers involved in billing disputes" and it makes no sense for "the FCC to assume the responsibility for addressing these and other consumer complaints at the retail level."[34] Under current practice, state agencies oversee all carriers within their jurisdiction by, among other things, requiring certification and managing numbers within the appropriate area codes. The role of certification requirements, as suggested by the

33. Again, as noted in footnote 27, we recognize that the institutional reform Working Group may well modify the procedures or institutional structure of the FCC and do not mean to indicate a preference for a particular set of reforms (or the FCC as it currently operates).

34. Kennedy, *supra* note 12, at 5.

above discussion, should be limited either to any FCC-authorized competition policy measures (under the "Limited Delegation" option) or appropriate consumer protection or other social policy concerns. Under no circumstances, however, should certification requirements be any more burdensome than absolutely necessary to accomplish such concerns, lest they become a barrier to entry.

In our view, in addition to protecting consumers from "unfair and deceptive practices" pursuant to DACA's Title I—Regulatory Framework, states should be allowed to promote public safety and homeland security, as well as manage public rights-of-way. States and localities would enjoy leeway in these areas regarding whether and how to impose any regulatory requirements. Specifically, whether or not the state or local obligations are expressly anticipated (such as a prohibition on slamming), states would be permitted, at least as an initial matter, to adopt any regulations they deemed appropriate. State authority would be curtailed, however, where the relevant obligations were inconsistent with federal law, "where there are substantial and clear efficiencies from eliminating diverse approaches, where a single approach is clearly optimal over others, or where there is a clear showing that the costs of diversity outweigh the benefits of state experimentation and implementation."[35] Similarly, where state regulations would create harmful and significant spillover effects, the FCC would be authorized (and indeed required) to preempt state regulation, thereby preventing a single state from imposing its suboptimal policy on the entire country. These "no spillover" standards are meant to remedy current holes in the Section 332 model used for wireless services, where reserving consumer protection authority to states has allowed *de facto* economic regulation in the name of consumer protection.

The decision to leave the state agencies with the initial authority to address these matters reflects the judgment that their proximity and accessibility to the affected consumers make them the superior institution to address such matters in the first instance. With respect to the consumer-affecting matters identified by the Working Group, states have adopted a range of strategies, including litigation, agency oversight, and consumer education initiatives. Following such experiments, such as the early efforts to develop a "do not call list," other states have adopted best practices and, in many cases, the federal government has embraced the best of breed and adopted similar measures as federal policy.

35. Weiser, *Cooperative Federalism and Its Challenges*, *supra* note 23, at 729.

IV. THE ROLE OF LOCALITIES IN TELECOMMUNICATIONS REGULATION

The role of localities in telecommunications regulation is an area of longstanding controversy, particularly insofar as new technologies have not fit the mold of their established counterparts. This Part discusses four prominent issues where local authorities have influenced telecommunications policy: (1) rights-of-way (ROW) management; (2) the administration of franchise requirements; (3) municipal entry into telecommunications markets; and (4) telecommunications specific taxation. We discuss each in turn, noting our respective recommendations. In general, the Working Group recommends that authority to act in these areas be given (if at all) to state agencies, with limited delegation to local authorities.

A. Rights-of-Way Access and State and Local Regulation

From the perspective of service providers, access to ROW is an essential predicate to entering a particular market and is often a gating factor. For localities, regulation of access to ROW is critical to "minimiz[ing] the damage to their expensive streets, limit[ing] traffic disruption, and, in some cases, supplement[ing] their general revenue by taxing carriers' use of [ROW]."[36] Given the importance of this issue, it is most unfortunate that, "almost nine years after the enactment of the Telecommunications Act of 1996, issues regarding access to public rights-of-way between providers and local authorities continue to be the focal point for dispute."[37]

The continuing legal disputes related to ROW issues relate both to the importance of the issue and the 1996 Act's lack of clear guidance on it. In 1996, Congress set forth a broad policy (codified in Section 253) of removing barriers to entry.[38] This broad policy contained four distinct

36. James B. Speta, *Competitive Neutrality in Right of Way Regulation: A Case Study in the Consequence of Convergence*, 35 CONN. L. REV. 763, 763 (2003).

37. Paul Glist et al., *Telecommunications "Franchising"*, 818 PLI/PAT 589, 593 (2005).

38. In its entirety, Section 253 provides:

> In general
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State regulatory authority
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

parts: (1) a call to preempt any state or local regulation that would "have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service"; (2) a safe harbor for state police power activities, including consumer protection; (3) a preservation of authority to "manage the public rights-of-way," including a right to "require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis"; and (4) FCC authority to enforce this policy. Like so much of the 1996 Act, each of these parts has spurred litigation, although many of the contested issues have yet to reach the Supreme Court.

In a stark reminder of the importance of access to ROW on reasonable terms, a recent AEI-Brookings Institute report highlighted that pro-competitive ROW policies are more significant in promoting broadband deployment than universal service policies.[39] Given the lack of legal certainty under federal law, different states have adopted different policies on the appropriate regulation of ROW. In light of the clear importance of promoting broadband deployment, however, it seems prudent to adopt a nationwide policy of reasonable access along the lines of some progressive state policies, such as California's. Under California law, governmentally imposed charges for ROW access "shall not exceed the reasonable costs of providing the service for which the fee is charged."[40]

> (c) State and local government authority
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.
>
> (d) Preemption
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253 (1996).

39. Scott Wallsten, *Broadband Penetration: An Empirical Analysis of State and Federal Policies* (AEI-Brookings Inst. Joint Ctr. on Regulatory Studies, Working Paper No. 05-12, 2005), *available at* http://aei-brookings.org/admin/authorpdfs/page.php?id=1161.

40. CAL. GOV'T CODE § 50030 (2003). In full, the California law provides:

> Any permit fee imposed by a city, including a chartered city, a county, or a city and county, for the placement, installation, repair, or upgrading of telecommunications facilities such as lines, poles, or antennas by a telephone corporation that has obtained all required authorizations to provide telecommunications services from the Public Utilities Commission and the Federal Communications Commission, shall not exceed the reasonable costs of providing the service for which the fee is

The appropriate nationwide policy on rights-of-way access should not only restrict localities and states to the imposition of any requirements necessary to legitimate rights of way management, but it should also limit the payment of fees to those related to costs caused by the effort to access rights-of-way.[41] For states and localities, it is tempting to levy fees related to, say, gross receipts in order to raise additional revenue. But such revenues constitute, in effect, a special tax on telecommunications providers and thus promise to deter the use of telecommunications services (and slow their deployment). To be sure, governmental entities highlight that ROWs are governmental property held in trust for the citizenry. This form of trust is breached, however, when governmental units take action that (unbeknownst to the citizenry) restricts the deployment of new technologies.

The various forms of communication technologies call for a broad definition of "electronic communications providers" which merit protection under the above provision. In numerous jurisdictions, providers have litigated the question of whether they fall within the class of providers entitled to reasonable ROW access. In California, for example, Williams Communications offered the following explanation, which an appeals court ultimately embraced:

> The [fiber optic] cables do one thing: they carry digitized optical signals (i.e. 1's and 0's) for customers, the content of which is neither controlled nor manipulated by Williams. Once the digital signals leave the Williams system, customers convert the signals into different forms of information, such as voice, music, video, computer data, facsimile material and other forms. Any particular cable or fiber may carry digital signals at any given time that will be converted for telephone, video, Internet and/or other forms of information. . . . Williams does not and cannot, as a matter of technology, determine the particular form of information carried on its lines at or over any given period of time.[42]

The Working Group concludes that, in calling for a reasonable access to ROW for all communications providers, it is important that states or localities not impose other barriers to entry. Consequently, the Working Group recommends that a revised version of Section 253 not

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charged and shall not be levied for general revenue purposes.
Id.; s*ee also* Williams Commc'ns v. City of Riverside, 114 Cal. App.4th 642 (2003) (interpreting provision).

41. *See* Speta, *supra* note 36, at 795-802.

42. *Williams Commc'ns*, 114 Cal. App.4th at 651.

only explicitly address ROW issues, but also preempt any legal requirement that "materially inhibits effective entry."[43]

Finally, the Working Group recommends that states work cooperatively with local authorities to police consumer fraud, to promote public safety and homeland security and to manage public rights-of-way. Accordingly, the proposed legislation allows states to delegate authority to local authorities to act regarding these issues. To the extent that a state follows a "home rule" model, such delegation shall be presumed (including for issues like permitting to lay cable under municipal streets) unless otherwise provided for by the particular state. In all events, however, no certification requirement should be unnecessarily burdensome so as to constitute a barrier to entry or (as discussed below) to impose requirements such as those traditionally associated with franchises to operate particular services.

B. Video Franchises

As with calling for a restricted role for governmentally imposed barriers to entry and limitations on access to rights-of-way, the Working Group expressed skepticism regarding the continued need for classic "franchises" imposed on cable television providers. In the case of telecommunications providers of different services—say, telephone service or broadband—it is clear that reasonable access and no barriers to entry is a critically important public policy. Nonetheless, some localities maintain that, even as the communications environment moves towards "everything over Internet Protocol," it is essential that the traditional cable franchise be allowed to continue. Before engaging the merits of this issue and the calls for "regulatory parity" between cable providers and telephone providers of Internet Protocol Television (or IPTV), we believe that it is important to place this issue in historical context.[44]

1. The Past As Prologue?

Cable television providers were the first new entrants into the telecommunications market. Before the development of Community Antenna TV (CATV), television (and radio) broadcasters—along with local telephone companies—enjoyed a form of franchised monopolies. In the case of telephone companies, states often legislated bans on entry and localities (for extra protection) might authorize access to the rights of

43. In so doing, it would resolve a split between the circuits. *See* Glist et al., *supra* note 37, at 597-98.

44. For a discussion of this point, *see* Raymond L. Gifford & Kyle D. Dixon, *Progress, Freedom, and Regulatory Transcendence*, 12.7 PROGRESS & FREEDOM FOUND. PROGRESS ON POINT 1 (2005), *available at* http://www.pff.org/issues-pubs/pops/pop12.7videoservices.pdf.

way under exclusive or preferential terms. In the case of television broadcasters, the Federal Communications Commission used its control over licenses to restrict competition between broadcasters (under the so-called *Carroll* doctrine).[45]

After a period of benign neglect, regulation of cable television providers (then known as CATV) reflected a commitment to "regulatory parity" or "level playing field" concerns. In particular, federal regulators concluded that cable providers should act and look just like broadcasters. To ensure that cable providers looked like broadcasters and were not able to avoid regulatory burdens imposed upon them, the FCC imposed a number of requirements, including mandates that they originate local programs and not provide any "pay TV" services. Under the weight of these requirements, called by one commentator as "a textbook example of anti-competitive regulation,"[46] cable television providers made only minimal strides in the marketplace. Over time, however, the FCC and the courts lifted a number of these restrictions, paving the way for cable TV's impressive growth in the late 1970s and 1980s.[47]

The development of satellite television providers (ultimately through the use of "direct broadcast satellite" or DBS) spurred another round of regulatory battles and calls for regulatory parity. The FCC rejected those calls and instituted a regulatory regime that allowed new entry. In upholding that judgment, the D.C. Circuit remarked that:

> Although a regulated industry may come to regard an agency's policies as immutable elements in the background against which the industry is set, there is no need for the agency itself to confuse means with ends; when new technology permits the statutory objectives to be attained through novel means that require the alteration or abandonment of past Commission policies, the Commission may adjust its means to retail fidelity to the legislative end.

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45. *See* Carroll Broad. Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958); Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, *Report & Order*, 3 FCC Rcd. 638, ¶ 1 (1988) (abolishing *Carroll* doctrine).

46. Thomas W. Hazlett, *The Wireless Craze, The Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke"*, 14 HARV. J.L. & TECH. 335, 419 (2001) [hereinafter *Wireless Craze*]; *see also* Stan Besen & Robert Crandall, *The Deregulation of Cable Television*, 44 LAW & CONTEMP. PROB. 77 (1981) (criticizing early regulation of cable television).

47. *See, e.g.*, Amendment of Part 76, Subpart G of the Comm'n Rules and Regulations Relative to Program Origination by Cable Television Sys., *Report & Order,* 49 F.C.C.2d 1090 (1974); FCC v. Midwest Video Corp. 440 U.S. 689 (1979) (invalidating, as beyond FCC's Title I authority, pre-Cable Act requirements for "leased access" channels and channels dedicated to "public, educational, and governmental", also known as "PEG") programming); HBO v. FCC, 567 F.2d 9 (D.C. Cir. 1977) (invalidating restrictions on pay television).

> Indeed, the Commission has long been criticized as acting primarily to preserve the status quo, thus discouraging innovative technology; when it instead seizes upon the "comprehensive powers to promote and realize the vast potentialities of radio" that Congress has conferred upon it, the Commission is to be commended rather than castigated.[48]

Following the light regulatory touch accorded to DBS in its inception, Congress and the FCC treaded lightly in imposing new obligations upon it. Ultimately, Congress did impose some of the traditional requirements on DBS (such as must carry obligations), but it did so only after the technology developed and in a manner that respected the technology's limitations.

2. The Cable Franchising Process

The process for obtaining a franchise for cable television ranged from efforts to emulate Harold Demsetz's theory of franchise regulation as "competition for a monopoly," to efforts to obtain benefits for a community through regulated mandates (reflecting Posner's theory of "taxation by regulation") to out-and-out political deals, enriching campaign coffers or the pockets of politically connected individuals.[49] In many cases, these franchises imposed forms of rate regulation on franchised monopolies, along with an array of requirements, including a mandate to carry public, educational, and governmental channels. Owing to the requirement to obtain a franchise in every municipality, one commentator estimated the total number of cable franchises as 34,000.[50]

In 1984, Congress enacted its first comprehensive legislative framework to govern cable television providers. Earlier, the FCC (under its "Title I authority") had developed an array of rules, including federal mandates for Public, Educational, and Governmental channels, many of which it later reversed or were challenged successfully in court. In

48. Nat'l Ass'n of Broad. v. FCC, 740 F.2d 1190, 1196 (D.C. Cir. 1984) (internal citations omitted).

49. For the academic descriptions of franchising as a form of controlling monopoly or as an alternative to fiscal policy, *see* Harold Demsetz, *Why Regulate Utilities*?, 11 J. L. & ECON. 55, 63 (1968); Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 41-42 (1971). For a discussion of the cable industry's earlier years, *see generally* MARK ROBICHAUX, CABLE COWBOY: JOHN MALONE AND THE RISE OF THE MODERN CABLE BUSINESS (2002).

50. Kent Lassman, *Franchising in the Local Communications Market*, 12.9 PROGRESS & FREEDOM FOUND. PROGRESS ON POINT 1 (2005), http://www.pff.org/issues-pubs/pops/pop12.9franchise.pdf.

enacting a Title VI to the Communications Acts of 1934, Congress set forth a clear framework to govern the previous squabbles related to franchising negotiations (and renewals) as well as put an end to regulating the rates of cable television providers. After its re-institution of cable rate regulation in 1992, the 1996 Act restricted the regulation of cable's rates—owing in large part to the effective entry of DBS providers under a favorable regulatory environment—and only left intact a requirement of a regulated basic package of offerings.

In 1996, Congress envisioned an alternative model for entering local video programming markets through "Open Video Systems" or OVS.[51] In theory, the OVS option provided a pathway for telephone companies to enter the video marketplace.[52] Under this mode of entry, providers could opt for FCC approval rather than a local franchise, although OVS providers were subject to some common carriage-like requirements. Nonetheless, whatever appeal that OVS offered largely dissipated when the Fifth Circuit concluded that the choice of an OVS mode of entry did not prevent the imposition of additional requirements.[53]

Over the last year or so, local telephone companies (notably, Verizon and AT&T) have outlined a strategy of delivering video programming over fiber optic networks using Internet Protocol-based technology. Dubbing their offering "IPTV" (for Internet Protocol Television), some champions of this offering maintain that it need not comply with Title VI's classic requirements for a local franchise, particularly ones relating to building out service to all portions of a community. In response, both cable companies and municipalities have insisted on a franchise as a condition of entry and lobbying battles in some state legislatures and in Congress have ensued.

3. A New Way Forward

In evaluating the model approach for a Digital Age Communications Act, the Working Group developed a new regulatory strategy to govern the delivery of video programming that would recognize the overall economic and technological convergence of services with other digital electronic communications services. In so doing, we recognized that the continuing rate regulation of a basic package of video

51. 47 U.S.C. § 573 (1996).

52. In the 1996 Act, Congress repealed a longstanding ban (forged from a fear of anticompetitive tactics) on telephone company entry into video markets . *See* Pub. L. 104-104, § 302(b)(1) (repealing 47 U.S.C. § 533(b)). Prior to this repeal, the courts, which originally tolerated this ban, were growing increasingly skeptical of its legality. *Compare* Gen. Tel. v. United States, 449 F.2d 846 (5th Cir. 1971) (upholding ban), *and* Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181, 202 (4th Cir. 1996) (invalidating ban), *vacated as moot*, 516 U.S. 415 (1996).

53. *See* City of Dallas v. FCC, 165 F.3d 341, 347-48 (5th Cir. 1999).

offerings had become antiquated and that an overly cumbersome franchising process for IPTV providers represented a formidable entry barrier.[54] Consequently, we embraced a revised framework that, at a state's option, would provide for statewide certifications that would entail no rate regulation or build-out requirements.

The Working Group recommends that states and localities not be allowed to impose rights-of-way or certification requirements on providers to the extent they rely on spectrum or other non-physical means to reach customers. We determined that, in those circumstances, providers will not affect public rights-of-way sufficiently to justify such requirements. We recognize that the limitation on state authority results in disparate treatment of these providers compared with providers which deploy physical networks (e.g., optical fiber, coaxial cable) to connect their customers. Although states must retain limited authority to prevent providers relying on physical networks from disrupting roads and other public infrastructure, such need is largely absent with respect to providers relying on non-physical networks. The Working Group decided that extending regulation where it is not needed simply to promote "parity" would undermine DACA's broader goal of promoting investment and innovation by avoiding unnecessary regulation of electronic communications services.

A similar desire to avoid unnecessary regulation prompted the Working Group to preclude state or local network "build-out" requirements. In theory, build-out requirements may be a plausible strategy for ensuring universal service by a monopoly provider. For a second entrant, however, the universal access concerns are irrelevant, making such a requirement entirely redundant and a barrier to entry for areas that would warrant competition. To be sure, we recognize a plausible equity concern that the first entrant has born the added responsibility of a build out requirement (that may not be profitable) and thus some Working Group members supported a "universal service fee" for IPTV providers. The majority of the group, however, concluded that

54. Would-be entrants have criticized the cumbersome regulatory process at the local level, explaining that:

> [T]o anyone who has actually tried to build a competitive system, it is painfully obvious that local regulators have become the bottleneck in the system. These regulators have emerged as neighborhood tyrants, protecting existing local and regional monopolies and effectively holding competitive broadband hostage. By creating unreasonable demands on any new entrant to the market, local regulators have slowed the advancement of broadband at the very moment when the telecom industry might finally be ready to enter the new age of innovation.

David McCourt, *What's a Polite Word for "Shakedown"?*, WALL ST. J., Oct. 1, 2005, at A9. Although there are, to be sure, local regulators who have facilitated robust entry, persistent complaints from the competitive community regarding local regulators persuade the Working Group that change like that proposed here is warranted.

the historic incumbency and first mover advantages that accompanied the requirement more than offset its burdens.

With respect to the use of a certification process, the Working Group agreed that there were notable ways in which the traditional franchising obligations (such as Public, Educational, and Governmental (PEG) channels) failed to live up to their initial aspirations (or, in the views of some, were misguided from the outset). In particular, local jurisdictional control of these channels or a limited amount of creativity and flexibility led to a number of disadvantages in the form of preventing sensible regional cooperation, sharing of facilities, and uses of alternative technologies (including websites, podcasting, and other viable forms of new media). While some members of the group pressed the strategy of reforming such franchise obligations by incorporating them into a statewide oversight process, the majority converged on the plan of eliminating them altogether. In so doing, the majority suggested that, to the extent states and localities wish to support video programming, they should work collaboratively with providers to ensure that such programming is delivered to their citizens (either on a purchased or contributed basis).

The Working Group recognizes that many state and local authorities have relied on franchise terms and conditions as means of benefiting their citizens. Thus, although we eliminate these features for the above reasons, we provide a transition period to provide some time for states and localities to make other arrangements. Specifically, we require the terms of existing franchises to be honored for a reasonable period, such as 3-5 years. Further, to lessen the disparity between incumbent cable franchise and telephone companies entering the video market, we afford states discretion to allocate an equitable portion of the costs of franchise fees and public access channels on telephone companies providing video programming. Although this approach does not eliminate all disparities or distinctions based on technology, we view this transition as an appropriate accommodation for state and local reliance interests and conclude that any ill effects associated with the terms of the transition will be mitigated by its short duration.

In envisioning video franchisees in a more flexible and creative light, it is also important to ensure that they do not impede entry. By replacing the franchising process with optional certification at the statewide level, we believe that transaction costs will be limited and that entry will be expedited. Finally, in terms of the particular state institution to manage this process, we follow the precedent of the Universal Service Working Group and conclude that it should be the state public utility commission unless the State Legislature appoints a different body to do so.

C. Municipal Entry

One issue that has attracted considerable heat (and often little light) over the last year is the prospect of municipalities entering into the telecommunications marketplace. In general, the Working Group is skeptical that municipalities can provide more effective services than their private sector counterparts.[55] Moreover, the Working Group also notes that, where municipalities make large scale investments, there is a possibility that they will use the police power (or taxing authority) to ensure that they are recovered.[56] Such concerns are notable, but for the reasons set forth below, we do not believe that a federal ban on municipal provision of telecommunications services—through wireless or other technologies—is appropriate.

In addressing this issue, we begin by noting that state law limitations on municipal entry raise an issue entirely separate from federal law limits. In terms of sovereignty, local municipalities rely on state law to empower them (often through a "home rule" regime). Because municipalities are creations of state law, we are mindful that efforts to protect localities against state regulation raise serious intergovernmental concerns. Consequently, we leave to the states whether or not to restrict municipal entry into telecommunications markets.

In declining to recommend legislation on this issue, we will suggest that it is quite plausible that reasonable cases of municipal entry into local telecommunications markets may exist. In particular, for local public safety applications (such as transmitting pictures of suspects in real-time), high speed access is an increasing concern. To the extent that commercial providers have not developed high speed networks to provide such functionality, a locality may well choose to contract for its construction for use by its public safety agencies. Once such a network is constructed, moreover, it may well be feasible to provide priority access to public safety and also allow the public to benefit from broadband connectivity. There may also be some sparsely populated communities unserved by commercial service providers where a municipal network may be the "last best hope" for affordable broadband access. Finally, other instances of market failure may justify municipal involvement in building broadband networks.

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55. For a discussion of the research calling into doubt the effectiveness of municipal entry, *see* Thomas M. Lenard, *Government Entry into the Telecom Business: Are the Benefits Commensurate With the Costs?*, 11.3 PROGRESS & FREEDOM FOUND. PROGRESS ON POINT 1 (2004), http://www.pff.org /pdf/16306.pdf.

56. For a discussion of this concern, *see Anticompetitive Threats from Public Utilities: Are Small Businesses Losing Out?: Before the H. Comm. on Small Business,* 109th Cong. 12-23 (2005) (statement of Adam Peters, Research Fellow, Progress & Freedom Found.).

Stated more generally, we are wary of instituting categorical limitations on municipal development of broadband or other communications technologies until we know more about their actual usage and cost characteristics. Rather, we suggest close scrutiny of them, confident that mistaken investments will defer other foolhardy efforts, and that legal safeguards against anticompetitive conduct should be vigilantly applied where appropriate. In particular, the Working Group notes that anticompetitive behavior is a promising strategy for municipally-backed market entrants and therefore would subject them to the same "unfair competition" standard as other market players.[57]

D. State and Local Taxation

The final way in which state and localities can hamper the development of electronic communications services is through industry specific taxation. With respect to taxation, we noted above that imposing costs on a particular industry—such as through excise taxes or rights-of-way fees—can deter the use of that industry's products or services. In cases where the tax is imposed on a "social bad," say, cigarettes, or even where the tax reflects a close proxy to a publicly provided resource (say, the relationship of gas to the funding of roads), deterring usage may not present a grave concern. But where the tax or fee is imposed as a means of raising general revenues, policymakers should be wary of singling out a specific industry. In the case of telecommunications, such taxes appear to be on the rise and thus are increasingly troubling.[58] For that reason, we call for preemption of all industry-specific taxation on electronic communications services.

CONCLUSION

In conclusion, we emphasize that the Report's direction and the associated draft statutory language adhere as closely as possible to the following principles:

Pro-competitive—Consumer welfare-driven competition policy is the overarching theme of DACA, outlined in the Regulatory Framework, and continued in this report. In authorizing state regulation, this framework emphasizes the role of a more rigorous, robust competition policy analysis and provides a mechanism for preempting regulations that are not so justified.

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57. David E.M. Sappington & J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 ANTITRUST L. J. 514 (2003); Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 HARV. J.L. & PUB. POL'Y 443 (2004).

58. Dennis Cauchon, *City, State Cell Phone Taxes on the Rise*, USA TODAY, May 8, 2005, *available at* http://www.usatoday.com/news/nation/2005-05-08-cellphone-taxes_x.htm.

Generality—The language aspires to be concise and general, as opposed to prosaic and prescriptive. Statutory delegations relating to a dynamic sector like communications regulation must be able to adapt to the rapidly changing circumstances, and not get bogged down in special provisions and specific carve-outs for favored (or against disfavored) entities.

Neutrality—The language aspires to bring all platforms and all regulatory jurisdictions within a unitary policy framework, administered by the FCC but cognizant of the states' comparative advantage in some roles.

Practicality—The federal/state framework recognizes the role of state regulation, its political vitality and its possible salutary purpose. The proposal recognizes traditional state roles relating to consumer protection, public safety, homeland security and management of public rights-of-way. It likewise preserves the ability to potentially retain a basic service rate, without undue distortion of the competitive market.

APPENDIX A: MODEL PROPOSED LEGISLATIVE LANGUAGE

The Digital Age Communications Act

Title II—ALLOCATION OF FEDERAL, STATE AND LOCAL RESPONSIBILITY

Section 1: Findings

(a) FINDINGS. The Congress finds the following:

that technological and market forces are changing the nature and delivery of electronic communications services;

that these technological and market changes have altered the necessary roles for federal, state and local authorities in regulating electronic communications services;

that, in many cases, responsibility to regulate activities relating to communications has been allocated to a state or local jurisdiction based on whether such activities were deemed to occur within that jurisdiction;

that as electronic communications services and technologies become increasingly digital and packet-based, it has become difficult, and often impossible, to rely on jurisdictional boundaries as the basis for allocating regulatory responsibility among jurisdictions;

that a regulatory regime enforced by multiple jurisdictions, based on disparate laws, may result in inconsistent, unpredictable and onerous rules that inhibit investment, innovation and competition;

that the Telecommunications Act of 1996, which made substantial changes in the allocation of responsibilities among regulators in different jurisdictions, nonetheless did not adopt a framework that addresses fully the challenges posed by the rapid technological and marketplace evolution of electronic communications networks and services; and

that given these shortcomings, new statutory guidance for allocating federal, state and local responsibility is necessary to achieve the purposes of regulating electronic communications networks and services.

(b) POLICY. In light of the findings in subsection (a), it is the policy of the United States:

to integrate federal, state and local regulation of electronic communications networks, as developed by this and other titles of this Digital Age Communications Act;

that electronic communications networks and services be governed by a single, unified, minimally pervasive regulatory regime determined and generally implemented at the federal level;

to eliminate rate regulation and rate-setting where market conditions adequately protect consumers' interest in reasonable rates;

to eliminate regulation based on technological or functional distinctions among communications services and networks;

to avoid extending legacy regulation to additional services, networks or providers;

to create incentives to invest in new technologies and encourage the deployment of advanced electronic communications services.

Section 2: State Regulation of Basic Local Rates

(a) GRANDFATHERED RATE REGULATION. Subject to the limitations of subsection (b), (c) and (d), a state may continue to regulate the rate for a basic, stand-alone local service. To qualify as such a service, immediately prior to the date of enactment of this Digital Age Communications Act, the service must have been (and must continue to be):

(1) offered separately from any other services to customers who are not providers of electronic communications services;

(2) of the type defined in 47 U.S.C. § 254 (c)(1), as interpreted by 47 C.F.R. § 54.101(a);

(3) provided via a circuit-switched telephone network; and

(4) lawfully regulated by the state.

(b) Rate regulation authority under this section shall not extend to any ancillary or vertical services offered in connection with basic, standalone local service, or apply to any service bundles that contain basic standalone local service as a component.

(c) Neither the Federal Communications Commission nor the states shall have rate regulation authority over any other retail or end-user electronic communications service except under section 3(a) of this Title II, or as authorized under Title I, Section 3: Unfair Methods of Competition Unlawful of this Digital Age Communications Act.

(d) REFORM OF RATE REGULATION. Parties at any time may petition a state authority to modify or eliminate its regulation of rates that otherwise would be preserved pursuant to subsection (a).

(1) The state authority receiving such a petition shall issue an order disposing of the petition within 270 days of receiving the petition or it will be deemed granted. For every service for which a state determines to continue to regulate the rate, the order shall demonstrate that the rate meets the qualifications of subsections (a) and (b) and (c) and shall also explain why the economic benefits of such regulation (or non-regulation) outweigh its economic harms.

(2) Parties may petition the Federal Communications Commission to review aspects of proceedings conducted pursuant to subsection (d)(1), including petitions to modify or eliminate rate regulation that are deemed denied.

(3) Within 180 days of receiving such a petition, the Federal Communications Commission shall issue an order preempting regulation of any rates that do not remedy methods or practices deemed unlawful pursuant to Title I, Section 3: Unfair Methods of Competition Unlawful. If the Commission fails to act within 180 days of receiving such a petition, it will be deemed denied.

(4) Parties may appeal the grant or denial of a petition pursuant to subsections (d)(2) and (d)(3) to the United States Court of Appeals for the District of Columbia Circuit.

Section 3: Implementation of Title I, Regulatory Framework

*[No Delegation Option]**

(a)*The Federal Communications Commission shall be the sole agency with jurisdiction to implement regulation and conduct adjudications under Title I-Regulatory Framework, except as specified in Section 4: State and Local Regulation.*

(b)*The Federal Communications Commission may not delegate authority to states to promote competition among providers of electronic communications services.*

*[Limited Delegation Option]***

(a) **COMMISSION-INITIATED DELEGATIONS. Except as expressly provided in Sections 2, 3(b) and 4 of this Title, the Federal Communications Commission shall have exclusive jurisdiction and authority to enact or implement rules, regulations or obligations, or conduct rulemakings or adjudications, under Title I-Regulatory Framework.**

(b)**For matters occurring wholly within a given state or locality, the Federal Communications Commission may delegate to that state or a subdivision thereof the authority to enforce any rules, regulations or obligations enacted or determined by the Federal Communications Commission under Title I – Regulatory Framework, or adjudicate disputes between providers of electronic communications services that implicate such rules, regulations or obligations.**

(1) **A delegation of authority pursuant to subsection (b) will be deemed invalid if the state or locality does not certify, and the Federal Communications Commission does not concur, that the state or locality is legally and practically competent to implement the action the Commission seeks to delegate. Such determinations will not be subject to collateral attack or interlocutory appeal.**

(2) **If a state or locality declines to accept, lacks authority or otherwise fails to implement a delegation of authority pursuant to subsection (c), upon public notice, the Federal Communications Commission shall assume responsibility for implementing that delegation.**

(3) **A state or locality may petition the Federal

Communications Commission to clarify the scope of a delegation of authority pursuant to subsection (c) or to obtain a waiver from any express or implied limitations on such delegation. Within 120 days of receiving such a petition, after affording interested parties the opportunity for comment, the Federal Communications Commission shall issue an order granting or denying the petition or it will be deemed granted.

(c) **Parties may appeal all decisions of the Federal Communications Commission or any state or subdivision thereof, as applicable, arising from this Section to the United States Court of Appeals for the District of Columbia Circuit.**

(d) **PETITIONS FOR DELEGATION. In the absence of delegated authority pursuant to subsection (b), a state or locality seeking to impose obligations among providers of electronic communications services under Title I, Regulatory Framework must petition the Federal Communications Commission for approval or denial of the proposed obligations.**

(1) **Within 90 days of receiving such a petition, the Federal Communications Commission shall issue an order granting or denying such petition or it will be deemed denied. Such determinations will not be subject to collateral attack or interlocutory appeal.**

(2) **After an appropriate notice and comment in response to a petition by any party—or on its own motion—the Federal Communications Commission may preempt actions taken in response to the granted petition, provided the Commission satisfies the requirements of Section 5: Limitations on State and Local Authority.**

(3) **State or localities may only petition under this subsection (d) as to matters contained and confined wholly within the petitioner's jurisdictional boundary.**

Section 4: State and Local Regulation

(a) AUTHORITY OF STATES. Notwithstanding Section 3, and subject to Section 5 of this Title, states or subdivisions thereof retain jurisdiction to enact and implement rules or regulations that the state or subdivision thereof determines, after notice and an opportunity for public comment, are minimally and directly necessary to:

(1) Prohibit unfair or deceptive acts or practices that would negatively affect consumers from using electronic communications services, including, by way of example, concealment of the terms and conditions affecting the price and quality of such services;

(2) Protect public safety and homeland security;

(3) Manage public rights-of-way and execute traditional police powers with respect to public spaces, provided that any fees imposed for access to rights-of-way shall not exceed the actual direct costs incurred by the state or subdivision thereof in managing the electronic communications service provider's use of such rights-of-way.

(b) SCOPE OF STATE AUTHORITY. Nothing in subsection (a) should be interpreted to otherwise allow states or localities:

(1) to implement Title I—Regulatory Framework;

(2) to enact forms of rate, quality-of-service or other forms of economic regulation except as expressly permitted under this Title; or

(3) to impose requirements pursuant to subsection (a) on providers of electronic communications services to the extent they rely on networks that connect to customers primarily through use of electromagnetic spectrum or other non-physical means.

(c) CERTIFICATION AND RIGHT-OF-WAY AUTHORIZATION. Providers of electronic communications services shall be authorized to construct or operate an electronic communications network over public rights-of-way, and through easements within the state, except that in using such easements the provider of electronic communications services shall ensure –

(1) that the safety, functioning and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of

facilities necessary for the electronic communications network;

(2) that the cost of the installation, construction, operation or removal of such facilities be borne by the provider of electronic communications services or subscriber or a combination of both; and

(3) that the owner of the property be justly compensated by the provider of electronic communications services for any damages caused by the installation, construction, operation or removal of such facilities by the provider, provided that a state or subdivision thereof shall not impose fees in excess of the costs not already covered under subsection (a)(3).

(4) any provider may petition the Federal Communications Commission for review of a state's or a locality's determinations under this section (c) pursuant to Section 5: Limitations on State and Local Authority.

(d) AUTHORITY OF LOCALITIES.

(1) Any locality that provides electronic communications services is subject to Title I, Section 3: Unfair Methods of Competition Unlawful.

(e) TRANSITION AND SUNSET FOR EXISTING AGREEMENTS.

(1) Providers of electronic communications services that, according to state law as of the date of enactment of this Digital Age Communications Act, remain bound by existing agreements adopted pursuant to section 47 U.S.C. §541 shall satisfy all terms and conditions of such agreements for 4 years from the date of enactment, whichever is later.

(2) States and localities may not renew, extend or otherwise subject any provider of electronic communications services to the agreements described in subsection (e)(1) beyond the duration specified in that subsection.

(3) Until the termination of an existing franchise agreement pursuant to subsection (e)(1), states may require any

provider of competing video service that may be certificated pursuant to subsection (b) to contribute an equitable portion of the costs associated with any fees and public access channels directly attributable to the agreement.

Section 5: Limitations on State and Local Authority

LIMITATION. Notwithstanding the provisions of Sections 3 and 4 of this Title, state and local authorities are hereby preempted and thus without authority to regulate electronic communications services or networks whenever the Federal Communications Commission concludes that

(1) state or local such regulation would be inconsistent with federal law;

(2) there are substantial and clear efficiencies from eliminating diverse regulatory approaches;

(3) a single regulatory approach is clearly optimal over others;

(4) there is a clear showing that the costs of diverse regulatory approaches outweigh the benefits of state and local experimentation and implementation;

(5) a single regulatory approach is clearly optimal over others;

(6) materially inhibits any provider (other than a state or locality) from effectively offering an electronic communications service;

(7) state or local such regulation would be inconsistent with the policy goals articulated in Section 1(b) of this Title; or

(8) state or local authorities have imposed a tax solely on some or all providers of electronic communications services.

PREEMPTION. If, after notice and an opportunity for public comment, the Federal Communications Commission determines that a state or local authority has imposed any statute, regulation or legal requirement that violates subsection (a), the Commission shall preempt the enforcement of such statute, regulation or legal requirement to the extent necessary to correct such violation or inconsistency. Where the

Commission reviews a state or local statute, regulation or legal requirement in response to a petition for preemption, rather than on its own motion, it shall grant or deny the petition within 180 days of receiving it, or it will be deemed denied. Parties may appeal the grant or denial of such a petition to the United States Court of Appeals for the District of Columbia Circuit.