



State Regulation: What's at Issue?

- States Have Traditionally Played a Significant Role
 - Taxation (Sales Tax, USF and other Specific Fees)
 - Regulation (Municipal Franchise, Telephone Service)
 - Consumer Protection (Deceptive Advertising, E-911)
- The Internet Is Big Business
 - More Transactions Are Provided via Internet!
 - Increasing 67% / Year
 - 8.5 Trillion \$ B2B in 2005 (Gartner)
- More Technology Is Utilizing the Internet
 - Not Just For Facilitating Traditional Sales (Goods/Services)
 - Distribution for Content
 - Content Is Either Regulated or Copyrighted
 - Voice (Vonage, Skype, Jajah)
 - Television (FIOS, Cellphone, Orb, Slingbox, iTunes, Real)
 - Music (iTunes, XM Online, Live365)
 - Movies (Movielink, CinemaNow, iTunes Moviebeam,)
- Government Is Increasingly Addressing Treatment of Internet Based Applications
 - VoIP
 - Privacy
 - Net Neutrality

Will States Role Be Marginalized or Reduced?

How Can Internet Companies Reasonably Comply With Inconsistent and State Rules

Legal Basis for Preemption

- Commerce Clause
 - Article I Section 8
 - Provides Congress Authority to Regulate Interstate Commerce
 - Expansive '37-'95
 - More Narrow '96-
 - Dormant Commerce Clause
 - State Regulation that Affects Interstate Commerce Upheld if:
(a) rationally related to legitimate state end; (b) does not create undue burden on Interstate Commerce
 - Are States That Regulate Internet Networks or Applications Violating the Commerce Clause?

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Legal Basis for Preemption

- Supremacy Clause
 - Article VI Constitution
 - Express or Implied
 - Expressly: Question for courts is whether the challenged state law was intended to be preempted
 - Implied: More Difficult
 - Did Congress *Occupy the Field*
 - *Direct Conflict* with Federal Law
 - Frustrate Federal Purpose

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Key Statutes – Section 230

- Section 230 “Communications Act”
 - It is the policy of the United States—
 - (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
 - (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
 - (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
 - Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

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Key Statutes – Section 332

- Section 332 (Mobile Services)
 - Notwithstanding [sections] of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the *other terms and conditions* of commercial mobile services.

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Key Issue “Battleground”
PUC Regulation of VoIP

- Telephony Services Traditionally Subject To PUC Regulation
- Regulation of Entry, Rates, Terms *via* Certification and Tariff
 - States Regulate Intrastate Services / FCC Regulated Interstate Services
 - VOIP is Provided Over the Internet
 - Can’t Determine Location of Customer’s of Nomadic Services

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Key Issue “Battleground”
PUC Regulation of VoIP (2)

- 2003 Minnesota PUC Found Vonage Telephone Company Subject to State PUC Regulation
 - Appealed to Federal Court and Petition for FCC Declaratory Ruling
 - Federal Court Decision (2003 Permanent Injunction)
 - Court found that Vonage was an Information Service not a Telecommunications Service and Federal Law Preempted Regulation of Information Services (ala Supremacy Clause).
 - Court Relied in part Upon Section 230 and Supremacy Clause
 - FCC Decision
 - FCC found that Service is interstate in nature.
 - Fact Specific Analysis
 - Found Intrastate Components Inseparable
 - Commerce Clause Analysis
 - Did Not Rule on Character of Service
 - FCC Preempted State PUC regulation of Vonage “like” service; Did not preempt consumer protection or other similar regulations

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Key Issue “Battleground”
PUC Regulation of VoIP (3)

- FCC Decision Was Appealed To 8th Cir. Oral Argument Was Concluded in January
- Outstanding Issues:
 - Should Cable or Other Network Based VoIP Provider’s Be Regulated Differently?
 - Facilities In the Ground
 - Are there Intrastate Components That State’s Can Regulate (eg E911)?
 - Was FCC Order Valid?

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Key Issue “Battleground”
Taxes and Fees

- Sale of Goods and Services Traditionally Taxed
 - Sales, Gross Receipts
 - Special Fees (E-911, Telecommunications, USF)
- Unique Aspects of Internet Based Services
 - What is it? Telecommunications/Internet
 - Where is it? Who gets to tax it assess Charges on it

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Key Issue “Battleground” Taxes and Fees (2)

- Key Aspect Is Physical Presence
 - In Quill Corp. v. North Dakota, the Supreme Court of the United States (the “Court” or the “Supreme Court”) held that an out-of-state seller must have a physical presence in a taxing state before the state could assert jurisdiction over the out-of-state seller to collect and remit sales (use) taxes.[1]

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Key Issue “Battleground” Taxes and Fees (3)

- Impact
 - States Revising Tax Laws
 - Expanding Definitions Internet/Telecom Distinction Evaporating
 - Special Assessments
 - Intrastate USF
 - E-911 Charges
 - Legal Battles To Come Due To Conflicts
 - Quill Revisited (what is nexus). Apple iTunes Tax?
 - Fees Based On “Number” vs. Subscriber Location
 - Definitional Issues (What is Telecommunications)
 - Can Internet Applications Have Intrastate Revenue

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Key Issue “Battleground” Consumer Protection (1)

- Source of State Authority
 - Police Powers
 - Deceptive Trade Practice Statutes
 - AG Enforcement
- Examples
 - AOL Consent Decree
 - VoIP E-911
 - Wireless Services (Other Terms and Conditions)
 - EG Coverage Maps

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Key Issue “Battleground” Consumer Protection (2)

- Current and Future Issues
 - E-911 Disclosures (Interconnected VoIP and Other)
 - E-911 Obligations
 - Spam
 - CAN-SPAM pre-empts existing state laws expressly regulating spam. Does not affect state laws that are more general in nature - such as laws addressing computer trespassing or false advertising.
 - Other Licensing Requirements (Not Just Telecom)
 - Network Security - Spyware (NY AG)
 - Click Fraud / Auction Fraud
 - Data Privacy (S. 2389)
 - Network Neutrality (Bits Bill)

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Conclusions

- Nomadic Nature of Internet Applications Creates Unique Environment for Preemption Under Commerce Clause.
 - Uncertain Status
 - More Cases Likely
- Federal Legislation Will Continue to Impact States
 - Increasingly Rely on Police Powers. State AG's.
- What Impact Will Location Enabling Technology Have on State Regulation