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Subsidized Rural Telephony and the Public Interest: A Case Study in Cooperative Federalism and Its Pitfalls

Even as the Supreme Court has directed the devolution of regulatory power from the federal government to the states, Congress and the FCC have infused a new set of regulatory duties and goals into telecommunications law. These devolutionary and deregulatory agendas, however, are fundamentally incompatible. Devolution does not destroy regulatory power; it merely diverts it, often in distorted form, from federal to state government. The usual defenses of federalism – substantive diversity, administrative efficiency, and enhanced political participation – behave perversely in an industry marked by convergence, interoperatibility, and network efficiencies. "Cooperative federalism" in telecommunications, at least insofar as it purports to promote deregulation, is a policy at war with itself.

I shall test the coherence of cooperative federalism in the administration of the federal Universal Service Fund (USF). The Telecommunications Act of 1996 directs state regulatory commissions to determine carriers' eligibility for universal service support in rural and high-cost areas. Universal service combines one of the objectives of traditional public utility law with the deregulatory orientation of the 1996 Act. By requiring state commissions to determine whether the presence of multiple eligible telecommunications carriers (ETCs) in rural markets advances the public interest, section 214(e)(1) of the Act invites the states to exercise independent (albeit not unconstrained) judgment. High-cost support under the USF therefore represents a prime instance of cooperative federalism.

The high-cost program shows that delegation to state regulators has almost systematically invited incumbent protection. State regulators frequently succumb to the temptation to discriminate based on a carrier's incumbent status or its technological platform. Controversies over "local usage," "wireline equivalence," carrier-of-last-resort obligations, and advertising demonstrate the states' propensity to burden competitive carriers. The states routinely fail to recognize crucial elements of the public interest, especially competitive neutrality, technological neutrality, consumer choice, and rural/urban parity. Worse, they treat the purported impact of additional ETC designations on the solvency of the USF as a pretext for denying eligibility for funding to competitive carriers. Although a forward-looking universal service financing mechanism, in lieu of the FCC's existing embedded-cost approach, would facilitate the full portability of support between incumbent and competitive carriers, neither the FCC nor the states appear prepared to adopt that solution. State-law recalcitrance within the high-cost program is so extreme that aggressive preemption will be required to restore equal legal footing to wireline incumbents and wireless competitive carriers.

Deregulation contains its own technology policy, and a successful one at that. The public interest in subsidizing rural telephony rests in the aggressive roll-out of advanced telecommunications infrastructure to the nation's geographic and economic limits. State administration has failed to honor competitive neutrality, portability of support, and parity between rural and urban Americans. The result – reflexive opposition

to competitive entry in rural telecommunications market – represents the antithesis of the 1996 Act. In short, decentralization translates, jot for jot, into massive resistance against deregulation.