

Appendix

This chart demonstrates how the legislative developments in the Omnibus Budget Reconciliation Act of 1993 (1993 Act) and the Telecommunications Act of 1996 (1996 Act) have changed the Communications Act of 1934 (1934 Act) to vest the Commission with exclusive jurisdiction over all rates regarding Local Exchange Carrier (LEC)-to-Commercial Mobile Radio Services (CMRS) interconnection.

Statute/Case Law Interstate Intrastate

In 1914, the Supreme Court held in *Shreveport Rate Case*¹ that the Interstate Commerce Commission (ICC) had the power under the governing federal statute to order an increase in specific intrastate railroad rates charged to customers in order to avoid discrimination against interstate commerce. The authority delegated by Congress to the ICC "extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."² States have no jurisdiction. The ICC has jurisdiction over intrastate railroad rates. "The powers conferred by the act are not thereby limited where interstate commerce itself is involved. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act."³

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The 1934 Act establishes dual a regulatory framework. Section 2(a) reserves to the FCC exclusive jurisdiction over interstate communications. Section 2(b) reserves to the states jurisdiction over intrastate communications. When Congress was drafting the 1934 Act, section 2(b) was proposed and supported by 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 Cases*["]"⁴

In 1964, the D.C. Circuit held that a space research laboratory's local microwave communications facilities, although physically located within a single state, are jurisdictionally interstate when used to terminate spacecraft data communications primarily in interstate or foreign commerce.⁵ The FCC has exclusive jurisdiction over physically intrastate facilities used to terminate communications in interstate or foreign commerce. States do not have jurisdiction over physically intrastate facilities used to terminate communications in interstate or foreign commerce.

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In 1980, the Second Circuit held that the charges for intrastate distribution of interstate foreign exchange and common control switching arrangement services are jurisdictionally interstate.⁶ The FCC has jurisdiction over all jurisdictionally interstate services: "The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology."⁷ The states lack jurisdiction over physically intrastate, but jurisdictionally interstate facilities and services.

In 1984, the D.C. Circuit held that the FCC has authority to prohibit restrictions on resale of intrastate WATS services used to complete interstate communications.⁸ "The dividing line between the regulatory jurisdictions of the FCC and states depends on the `nature of the communications which pass through the facilities [and not on] the physical location of the lines.'"⁹ The states do not have jurisdiction over services that are jurisdictionally interstate in nature, even if physically intrastate.

In 1987, the Supreme Court held in *Louisiana PSC* that the Section 2(b) "fences off" intrastate depreciation rates from FCC jurisdiction. To preempt state regulation of such matters, the FCC must show that: (i) it is impossible to separate the intrastate and interstate portions of the subject to be regulated; and (ii) the state regulation conflicts with the valid

federal goal. Section 2(a) reserves to the Commission exclusive jurisdiction over interstate depreciation rates. Section 2(b) reserves to the states jurisdiction over intrastate depreciation rates.

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In 1987, the FCC finds pursuant to *Louisiana PSC* that it lacks jurisdiction over intrastate LEC-to-cellular interconnection rates and costs because they are severable from interstate LEC-to-cellular rates and costs.¹⁰ The FCC has jurisdiction over LEC-to-cellular rates for interstate services. The states have jurisdiction over LEC-to-cellular rates for intrastate services.

In 1993, Congress enacts the Budget Act of 1993, amending Sections 2(b) and 332 of the Act. All CMRS is "federalized" by section 332, which vests plenary authority in the FCC to implement the definition of, and level of Title II regulation applicable to, all CMRS providers. Section 332 also gives the Commission exclusive authority to hear state petitions to receive rate regulation authority.

Section 332(c)(1)(B) authorizes the Commission to order physical interconnection between CMRS providers and LECs pursuant to section 201. Section 201(a) authorizes the Commission to order all common carriers engaged in interstate or foreign communications by wire or radio to Section 2(b) is amended to except section 332 from the general reservation of state jurisdictional authority. The states no longer have any jurisdiction over CMRS, or LEC-to-CMRS interconnection rates. The scope of federal authority reverts to the amplitude of pre-section 2(b) *Shreveport Rate Case*.

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establish physical inter-connections, upon reasonable request, and at just, reasonable and nondiscriminatory rates. LEC-to-CMRS interconnection is "federalized."

In 1996, Congress enacts the Telecommunications Act of 1996. Section 253 of the 1996 Act authorizes the Commission to preempt state and local laws that prohibit, or have the effect of prohibiting, the ability of any entity to provide interstate or intrastate telecommunications service.

Subsection 253(e) provides that "[n]othing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."

Section 251(i) of the 1996 Act makes clear that the new interconnection provisions "are in addition to, and in no way limit or affect, the Commis-

Federal preemption of state rate and entry authority over CMRS providers is preserved.

The FCC's plenary authority over all LEC-to-CMRS interconnection under Sections 332(c)(1)(B) and 201(a) is preserved.

Section 253 authorizes the FCC to preempt any state requirement inhibiting provision of interstate *or* intrastate telecommunications service.

Section 332(c)(3) of the 1993 Act already preempts state barriers to entry for CMRS providers, and the 1996 Act does not disturb this legislative mandate.

The 1993 Act's elimination of state authority over "intrastate" components of LEC-to-CMRS interconnection is not affected by the 1996 Act.

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sion's existing authority under section 201 of the Communications Act."

Section 601(c)(1) provides that the 1996 Act "shall not be construed to modify, impair, or supersede Federal, State, or

local law unless expressly so provided in [the 1996 Act]".

The 1996 Act must not be construed "impliedly" to repeal the 1993 Act's grant of plenary jurisdiction over CMRS to the FCC.

The 1996 Act must not be construed impliedly to reinstate state rate and entry authority over CMRS previously eliminated by the 1993 Act.

In 1997, the Eighth Circuit applied a strict reading of section 2(b) in *Iowa Utilities Board v. FCC* to hold that "the 1996 Act, when coupled with section 2(b), mandates that the states have the exclusive authority to establish the prices regarding the local competition provisions of the Act."¹¹ Congress is authorized to expand section 2(b) limitations by enacting legislation granting the FCC intrastate ratemaking authority. Congress did so in section 543(b)(1) of the Cable Act where it granted the FCC power "to ensure that the rates for the basic service tier are reasonable"¹² and in section 276 of the 1996 Act where it required the FCC "to establish a compensation plan regarding both intrastate and interstate pay phone calls."¹³ The absence of a direct grant of FCC authority provides an "indication that Congress intended to reserve for the states the retained authority to set the prices regarding the local competition provisions contained in section 251."¹⁴

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In 1997, the D.C. Circuit confirmed that Congress, by enacting section 276 of the 1996 Act requiring the FCC to establish regulations ensuring that payphone operators be "fairly compensated," authorized the FCC to set local coin rates for payphones and thereby preempt states' power to regulate such rates.¹⁵ The FCC's jurisdiction over local coin rates did not arise by implication, but rather, Congress gave the Commission "an express mandate to preempt State regulation of local coin calls." The Court found that, while Section 276 was subject to the substantive and interpretive limitations of 2(b), Congress's grant of authority to the FCC was so "unambiguous" and "straightforward" as to override the command of section 2(b).

1. *See* *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914) [hereinafter *Shreveport Rate Case*].
2. *Id.* at 351.
3. *Id.* at 358.
4. *See* *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372 (1986).
5. *See* *California Interstate Tel. Co. v. FCC*, 1 Rad. Reg. 2d (P & F) 2095, 2099 (1964); *California Interstate Tel. Co. v. Western Union Tel. Co.*, 1 Rad. Reg. 2d (P & F) 2081, 2082 (1963).
6. *See* *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980).
7. *See id.* at 1066 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168-69, (1968); *General Tel. Co. v. FCC*, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)).
8. *See* *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).
9. *See id.* at 1498 (quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1010 (1978); *NARUC v. FCC*, 738 F.2d 1095, 1114-15 (D.C. Cir. 1984); *Computer and Comm. Indus. Ass'n v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, 491 U.S. 938 (1983)).
10. *See* *The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling*, 2 FCC Rcd. 10, para. 18, 63 Rad. Reg. 2d (P & F) 7 (1987).
11. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*,

118 S. Ct. 879 (1998). Incumbent local exchange carriers (ILECs) challenged the FCC's mandate on state commissions to employ the "total element long-run incremental cost" (TELRIC) method to calculate the costs that an ILEC incurs in making its facilities available to competitors. *Id.* These costs are then used to determine the price that an ILEC may charge its competitors. *Id.* at 793. ILECs disliked the fact that the TELRIC method does not incorporate their "historical" or "embedded" costs—those costs that an ILEC incurred in the past to build its local network and has not yet fully recovered under state regulation. *Id.* at n.8.

12. *Id.* at 797.

13. *Id.* (citing Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555, 561-62 (D.C. Cir. 1997)). The Eighth Circuit distinguished direct grants of authority contained in both the Cable Act and in section 276 of the 1996 Act from "roundabout construction" of authority under section 251. *Id.*

14. *Id.*

15. *See* Illinois Pub. Telecomm. Ass'n v. FCC, 117 F.3d 555, 562 (D.C. Cir. 1997), *cert. denied sub nom.* Virginia State Corp. Comm'n v. FCC, 66 U.S.L.W. 3458 (U.S. Mar. 30, 1998) (No. 97-1072). Several telecommunications service providers and state regulatory commissions challenged various aspects of the Commission's payphone regulations. *Id.* The petitioners argued, among other things, that (1) the 1996 Act did not authorize the FCC to set local coin rates for payphones and (2) the FCC's decision to deregulate local coin rates for payphones was arbitrary and capricious.