

Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong" H

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I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. For one

in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.

—Justice Oliver Wendell Holmes¹

I. Introduction: Whither American Wireless?

In 1993, the United States Congress envisioned two alternative marketplace scenarios for providers and consumers of commercial mobile radio services (CMRS) in the United States. In the first scenario, CMRS and personal communications services (PCS) would be affordable, if not essential parts of most peoples' lives. U.S. business would excel in global competitiveness due in part to Americans' easy access to the latest in telecommunications technology. "Just-in-time" access to information would put U.S. corporations ahead of rivals abroad. A diverse group of CMRS providers would offer a wide range of wireless services at competitive prices, a situation made possible by low market entry barriers and competition among several wireless networks operating in all markets.² Competition and limited regulation would spur investment in research and the development of new services.³

In the second scenario, the United States would lag behind the rest of the world in widespread access to affordable wireless communication services. Wireline monopoly networks would comprise the dominant mode of communication. Demand for and use of CMRS would be satisfied by high costs that limit ubiquity and widespread use. Competitors abroad would benefit from the high penetration of continent-wide wireless systems with the accompanying freedom of movement and instantaneous access to information for the many instead of the few. Research and development would remain stagnant in the United States and few new products would emerge due to pervasive state regulation of CMRS. The heavy hand of regulation exercised by one federal and fifty state commissions would make potential wireless investors wary and operators lethargic. U.S. consumers would have only a vague awareness of wireless as a service that seemed to hold great potential and experienced great success abroad, but never lived up to its promise in the United States.

Sensing a dramatic turning point for U.S. wireless telecommunications, President Clinton and Congress resoundingly endorsed competition, the relaxation of federal and elimination of state regulation, and the widespread availability of spectrum through government-sponsored auctions envisioned in the Budget Reconciliation Act of 1993 (1993 Act).⁴ In President Clinton's words: "This plan creates the infrastructure to develop the most advanced commercial wireless communication networks the world has ever known. It will allow an industry to grow by tens of billions of dollars by the end of the decade, producing hundreds of thousands of new high-skilled, high-wage jobs."⁵ Despite the strong preference articulated by Congress and the Clinton Administration for light-handed regulation and a number of significant Federal Communications Commission (FCC or Commission) decisions implementing the statutory directive, a pivotal jurisdictional debate is now taking place at the Commission and in the court system.⁶ Its outcome will decide whether a unique communications medium with much promise for the business and personal lives of Americans will be allowed to develop in a uniform deregulatory environment that promotes competition.⁷

Because wireless networks increasingly operate on a multistate or on a nationwide competitive basis and calls frequently traverse state borders, Congress freed wireless carriers from the dual (federal and state) regulatory jurisdictional system designed to regulate the monopoly common carrier activities of the former Bell System and the hundreds of independent telephone companies around the country (such as GTE) that were not part of the Bell System. Congress reasonably concluded that today's wireless networks differ fundamentally from monopoly local exchange carriers. Indeed, a wireless call to Virginia may originate in the District of Columbia, while the caller drives across the state line to Maryland and the call is routed to and switched in New York. If CMRS providers were treated like wireline carriers they would be forced to make artificial distinctions so that their calls could be classified into historic state or federal regulatory categories that would be antediluvian, unnecessary, and harmful. The imposition of these outdated requirements would impede the development of wireless in the United States. Nevertheless, that is precisely what landline competitors, some states, and perhaps even the Commission may seek to do, notwithstanding these fundamental differences and Congress's legislation establishing a *federal* regulatory system for CMRS providers.

In the wake of Congress's CMRS amendments to the 1993 Act and the increased awareness of CMRS issues engendered by the statute, the FCC took several actions that demonstrated its understanding of the inherently interstate nature of CMRS.⁸ Since then, much of the Commission's energies have been diverted by other significant issues such as conducting spectrum auctions, licensing services, and, perhaps most importantly, by its role in solving the myriad technological and political challenges raised by the Telecommunications Act of 1996 (1996 Act). Because the future of wireless regulation and the industry will ultimately be determined by the decisions of regulatory bodies and the courts,⁹ this Article seeks to focus the attention of regulators, practitioners, and jurists on the federal jurisdictional scheme for CMRS established by Congress.

This Article will examine the 1993 Act, its legislative history, the Communications Act of 1934, and the relationship between the statutes in the overall context of telecommunications industry regulation. The last task is complicated by the recent passage of the Telecommunications Act of 1996. The Authors conclude that the amendments to sections 332 and 2(b) in the 1993 Act explicitly give the Commission exclusive, plenary regulatory jurisdiction over CMRS providers, save for the limited consumer affairs authority Congress determined should be maintained by the states.¹⁰ The states' remaining authority over CMRS providers is strictly limited. In sum, Congress sought to achieve its view of a uniform, nationwide deregulatory environment for CMRS by centralizing authority in the Commission and directing it to rely upon market forces, not regulation. In several instances, the Commission, state regulators, and courts have argued that Congress's actions were not plenary.¹¹ The Authors believe these actions jeopardize Congress's vision, misconstrue the statutory scheme, and are not in accord with precedent and sound statutory analysis.

II. The Evolution of FCC Jurisdiction: History and Development

A. Pre-1934 ICC Jurisdiction

Although today it is a well-settled principle of constitutional jurisprudence that the Commerce Clause is a source for federal government regulation and oversight of industry affairs, federal agency jurisdiction over interstate commerce often has been at the center of the debate over the proper balance of federal and state power.¹² Pursuant to the authority granted by the Commerce Clause, Congress established the Interstate Commerce Commission (ICC) in 1887.¹³ The 1910 Mann-Elkins Act, an amendment to the Interstate Commerce Act, brought the communications industry under federal regulatory authority by vesting the ICC with jurisdiction over the interstate rates charged by "telegraph, telephone and cable companies."¹⁴

Although the ICC had been established at a time when the Commerce Clause was interpreted narrowly, the 1914 Supreme Court decision in *Houston, East & West Texas Railway Co. v. United States (Shreveport Rate Case)*¹⁵ established the far-reaching scope of permissible federal ICC regulation. The *Shreveport Rate Case* involved a challenge to the power of the ICC to regulate the *intrastate* rates charged by railway carriers to prevent discrimination against *interstate* transport. The ICC had established maximum rates for railway transport from Shreveport, Louisiana into Texas after having found that the rates being charged unjustly discriminated against interstate carriers. Although the carriers did not object to the establishment of rates for interstate transportation, they did oppose the ICC order that they cease charging lower rates for intrastate hauls "from cities in Texas to such points under substantially similar conditions and circumstances"¹⁶ so as to give "an unlawful and undue preference and advantage"¹⁷ to intrastate shipments.

Recognizing the need to establish plenary federal power over interstate commerce,¹⁸ the Court delineated the scope of federal jurisdiction before addressing the authority of the ICC to promulgate specific interstate rate regulations. Although the rates for intrastate transportation were lower than the interstate rates set by the Commission, the Court reasoned that:

[t]he fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been

confided to Federal care.¹⁹

In describing the basis for this expansive view of federal power, the Court explained that permitting state regulation to interfere with federal regulation would mean that "Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."²⁰ While recognizing the inability of Congress to "regulate the internal commerce of a State,"²¹ the Court ruled that federal power extended to "all matters having such a *close and substantial relation to interstate traffic*"²² Removing all doubt about the implications of its holding, the Court stated that the authority of Congress was paramount even though "intrastate transactions of interstate carriers may thereby be *controlled*."²³

Having solidly established federal authority over the intrastate rates in question, the Court then addressed the scope of authority granted to the ICC by Congress. This analysis considered whether Congress had exercised the full mandate of its power to authorize the ICC to prescribe the challenged rate regulations. Although the Court found that a strict reading of the statutory language was inconclusive as to congressional intent,²⁴ the legislative history revealed that Congress had recognized that "the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic."²⁵ From its examination of the legislative history, the Court determined that the "underlying purpose and aim of the measure is the prevention of these discriminations."²⁶ Based on these findings, the Court ruled that the ICC had acted within its grant of authority²⁷ in finding that "unjust discrimination existed under substantially similar conditions of transportation"²⁸

Sixteen years after establishing the breadth of the federal commerce power over the regulation of common instrumentalities of intra- and interstate commerce in the *Shreveport Rate Case*, the Supreme Court had the opportunity to address the scope of ICC authority over the telephone industry. *Smith v. Illinois Bell Telephone Co.*²⁹ involved a challenge to the state commission's authority to prescribe regulations in the face of an ICC decision to require a uniform system of depreciation accounting for telephone equipment. In rejecting the state's argument that the ICC had exceeded its jurisdiction, the Court found the ICC regulations proper and focused on the method that had been used to apportion property, revenues, and expenses between the intrastate and interstate aspects of the business to ensure that each aspect fell to the appropriate regulatory authority.³⁰ In decrying the lower court's failure to separate the intrastate and interstate aspects, the Court stated that "[t]he proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this cannot be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority."³¹ The Court remanded the case to the lower court to apportion the revenues and expenses; the decision foreshadowed intra- and interstate separations analysis that would define federalism in U.S. common carrier telephone regulation for the rest of the century.

B. The Communications Act of 1934: Dual Jurisdiction and the Road to Louisiana PSC— A Definitional Destination

Prompted by the lobbying efforts of state regulators and President Franklin Roosevelt's desire to bring telephone and broadcasting regulation under the same jurisdiction,³² Congress passed the Communications Act of 1934 (1934 Act).³³ During the legislative process leading up to the enactment of the 1934 Act, the National Association of Regulatory Utility Commissioners (NARUC) lobbied relentlessly for language to be included in the 1934 Act that would prevent the FCC from using a *Shreveport* rationale to regulate aspects of intrastate telephone services.³⁴ As a result of these efforts, sections 1 and 2(a) of the 1934 Act simultaneously endow the FCC³⁵ with jurisdiction over "interstate and foreign commerce in communication by wire and radio"³⁶ while section 2(b) prohibits the Commission from regulating "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier"³⁷ In an attempt to unleash the national economic power of the telephone while responding to the political concerns of the states, Congress created a dual regulatory scheme in which the FCC oversees the development of a "rapid, efficient, Nation-wide, and world-wide"³⁸ interstate communications network while declaring intrastate communications services beyond the reach of federal authority.

The 1934 Act codified a dual jurisdictional scheme. The regulatory boundaries ostensibly were drawn such that state or federal regulators usually would act only within their respective spheres of competence. Ever since the passage of the 1934 Act, the FCC has attempted to navigate tricky waters—keeping its hands on the rudder of section 1's mandate to set a national telecommunications policy while steering clear of the state regulatory matters declared "off limits" by section 2(b). For the first fifty years of the Communications Act of 1934, however, courts placed very few judicial limitations on the scope of FCC preemption of any state action.³⁹ Significantly, in its 1976 Specialized Mobile Radio (SMR) decision,⁴⁰ the D.C. Circuit upheld the FCC's preemption of state certification requirements for all private dispatch radio systems without regard to whether services provided by such operators typically crossed state borders. The court based its reasoning on a finding that SMR could not be classified as common carriage because it did not share all elements of the definition of such services.⁴¹ The definitional approach taken by the FCC and upheld by the court removed state substantive jurisdiction over any communications aspect of SMR.⁴² Stated somewhat differently, these services were no longer subject to FCC jurisdiction under Title II or comparable state statutes enacted pursuant to state authority provided by section 2(b). The state of FCC preemption law just prior to 1986 has been characterized as follows:

[T]he FCC could preempt multijurisdictional use of facilities if it was simply "difficult" to separate the inter- and intrastate communications flowing over them, and mere "frustration" of federal objectives could constitute a "substantial effect" upon federal jurisdiction supporting preemption of intrastate communications as an *independent* ground (irrespective of whether inter- and intrastate communications could be separated in some way).⁴³

The Commission's then-current practice of reading certain services outside of its—and by implication the states'—Title II or common carrier jurisdiction had been very successful. However, the Supreme Court's 1986 *Louisiana Public Service Commission v. FCC*⁴⁴ decision redesigned the landscape of FCC preemption of state common carrier regulation. The Court looked anew at the jurisdictional tension inherent in the 1934 Act and reinterpreted the scope of the FCC's preemptive power. The Court shifted the analytical focus away from federal policy objectives such as competition and toward a stricter reading of the language contained in the Act and an investigation of the scope of the Commission's authority as defined by Congress in its laws. As the *Louisiana PSC* Court explained:

While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. . . . Section 152(b) constitutes . . . a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes.⁴⁵

While the *Louisiana PSC* decision is universally seen as reining in FCC authority, its principal holding is that the Court and the Commission, including state commissions, are bound by legislative *definitions* of the Commission's authority.⁴⁶ To apply the *Louisiana PSC* reasoning in context of the mobile services industry, just as Congress could *deny* FCC power in section 152(b), Congress could *endow* the FCC with the exclusive authority to regulate certain services.⁴⁷ Conscious of the Court's definitional emphasis and the difficulties experienced by the mobile services industry at the state level, Congress did exactly that by further amending section 332 of the Act and section 2(b) in 1993. In doing so, Congress explicitly bestowed nationwide authority on the FCC to regulate the mobile services industry that Congress found to be inherently interstate.

C. The Omnibus Budget Reconciliation Act of 1993: Displacement of State Regulatory Authority

During the 1980s many recently licensed cellular service providers encountered state regulatory and local telephone company practices that were harmful to the development of the industry.⁴⁸ As Congress became more aware of the barriers to entry and obstacles to growth presented by state regulation, it moved toward providing unequivocal federal authority to the FCC to foster development of this unique wireless medium.

The key to understanding the jurisdictional struggles over state-federal tension built into the 1934 Communications

Act lies in recognizing the competitive potential of wireless technology and the federal licensing scheme found in Title III of the 1934 Act. Traditional telephone regulatory principles are rooted in the monopolistic origins of landline telephony—the view that wireline operators control an essential bottleneck facility that operates as a monopoly. In the old Bell System framework, protecting the "public interest" meant using the state's power to monitor and support a communications monopoly. Many commentators have documented that averaged rates, alleged implicit subsidies, and an abundance of social policies were built into telephone industry pricing.

When cellular radio technology appeared, its prospects were markedly different. Wireless telephony sprang from a competitive environment that had its origins in spectrum allocation decisions that contemplated multiple carriers.⁴⁹ Its technology was inherently different, too. Instead of massive wire and cable infrastructure and easily drawn distinctions between in-state and interstate calls, wireless networks employ distributed cell sites. Wireless calls by nature are "on the move" and difficult to fit into the traditional categories. With this new medium, "the public interest" has always meant championing deregulatory and competitive policies to the benefit of both consumers and business, particularly because mobile radio provided a valuable service. The wireless industry attempted for years to thrive in a nether zone of the old regulatory paradigm, even as landline telephony underwent an enforced but often bitterly opposed migration toward increased competition. However, it became evident to Congress that the wireless paradigm needed statutory support to reach its potential. Congress recognized the fundamental uniqueness of CMRS by enacting a separate federal regulatory framework designed to advance the public interest in a new way: by encouraging national competition unfettered by onerous state or federal regulation.

1. Sections 2(b) and 332 Shift of CMRS Jurisdiction to the FCC

The drafters of the 1993 Amendments intended a regulatory scheme applicable to CMRS that would "foster the growth and development of mobile services that, by their nature, *operate without regard to state lines* as an integral part of the *national* telecommunications infrastructure" ⁵⁰

To ensure the achievement of this national goal of CMRS "growth and development," Congress explicitly endowed the FCC with exclusive jurisdiction over wireless regulation and simultaneously acknowledged the inherently interstate nature of the industry. The 103d Congress used section 6002 of the 1993 Act⁵¹ to revise section 332⁵² and section 2(b) of the Communications Act of 1934, thereby abolishing the interstate/intrastate dichotomy for CMRS and "establish[ing] a *Federal* regulatory framework to govern the offering of *all* commercial mobile services."⁵³

a. The Substantive Grant—Section 332

Recognizing that it is neither practical nor desirable to disentangle the intrastate segments of CMRS from its interstate nature, Congress enacted section 332(c)(3) of the Communications Act, which begins: "Notwithstanding sections 152(b) and 221(b) 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" ⁵⁴

In effect, the congressional amendments to the Communications Act in 1993 combined the original section 332 removal of all state jurisdiction with an expansion of *federal* power and a direction to the FCC to forbear from regulation if forbearance is in the public interest. Initially, the FCC exercised this authority boldly. For example, by August 8, 1994, eight states had filed petitions to retain their authority to regulate intrastate CMRS rates.⁵⁵ However, these petitions were rejected by the Commission,⁵⁶ which ruled in favor of a single federal regulatory policy for the wireless industry.⁵⁷ While the FCC was given the authority to regulate the mobile services industry, the statute and the FCC's implementing orders⁵⁸ also established a basis for the Commission to *forbear* from regulation when less government action might engender more competition.⁵⁹

b. FCC Express Jurisdiction over LEC Interconnection with CMRS: Section 332(c)(1)(B)

Section 332 also contains an explicit grant of federal authority over the interconnection between local exchange

carriers and CMRS providers. The legislative history of this section states that it was included in the bill because: "[t]he Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."⁶⁰

This express grant provides further support for the view that Congress intended to provide a singularly federal CMRS regulatory framework through the interplay of the changes to both sections 332 and 2(b).

In its 1996 local competition decision, the FCC explicitly acknowledged its jurisdiction over CMRS but deferred determining the precise scope of its authority. "We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time."⁶¹ This specific question was soon resoundingly answered by the Eighth Circuit in *Iowa Utilities Board v. FCC*⁶² (*Iowa Utilities*) which found comprehensive jurisdiction sufficient to establish rules to promote the CMRS industry in general and interconnection rules in particular.

In the *Iowa Utilities* case, the Eighth Circuit considered whether the FCC had exceeded its jurisdiction in promulgating pricing rules for interconnection with incumbent local exchange providers under the 1996 Act.⁶³ Pursuant to this authority,⁶⁴ the FCC promulgated rules governing the pricing of all interconnection between local exchange carriers and new market entrants.⁶⁵ Initially, the FCC's move into the traditional realm of state regulation caused state commissions and incumbent local exchange carriers to challenge the rules in court and to file a successful motion to stay the implementation of the rules.⁶⁶ However, the court foreshadowed its eventual decision in the case by agreeing to lift the stay *only* as it applied to interconnection between local exchange providers and CMRS providers. The Eighth Circuit's order lifting the stay only as to CMRS demonstrates an understanding of not only expansive FCC jurisdiction over CMRS providers, but also of the diminished state jurisdiction over the CMRS industry. Although the Eighth Circuit struck down the FCC's interconnection orders that sprang from the new authority provided to the FCC to promote local competition by the 1996 Act, the court upheld the validity of the FCC's jurisdiction as applied to CMRS providers.⁶⁷

c. Section 2(b) Elimination of Jurisdictional Bar Save for "Other Terms and Conditions"

To remove any doubt about FCC or federal jurisdiction over CMRS, Congress not only added express provisions to section 332, but also amended section 2(b) of the Communications Act—the statutory source for all state authority over communications common carriers.⁶⁸ As revised in 1993, section 2(b) maintains the states' pre-existing intrastate jurisdictional authority, *except* with regard to "interstate mobile radio communication service or radio communication service to mobile stations on land vehicles."⁶⁹

This amendment stands out as particularly important because, as we have seen earlier, without the jurisdictional limitations enunciated in section 2(b), the Communications Act of 1934 places virtually unlimited authority over intrastate telecommunications in the FCC's hands. As the U.S. Supreme Court concluded in its pivotal *Louisiana PSC* decision,⁷⁰ the legislative history of section 2(b) reveals that state regulators forced the insertion of the section in response to the Court's decision in the *Shreveport Rate Case*,⁷¹ which upheld the ICC's authority to order increases in intrastate railroad rates if those rates had a discriminatory effect on interstate carriers.⁷² The Supreme Court in *Louisiana PSC* found, however, that section 2(b) was not aimed at allocating jurisdiction of only rate issues. Instead, Congress drafted that section to cover the most basic and far-reaching issues "for or in connection with, intrastate communication services."⁷³

In limiting state authority over mobile radio communications through its amendment of section 2(b), the 103d Congress in effect invoked the *Shreveport*-era doctrine, with all of its implications for federal-state regulation, to establish federal Commission jurisdiction over mobile radio services. Since 1934, section 2(b) had "fenced off" intrastate common carrier services from the exercise of FCC jurisdiction and reserved intrastate regulatory power to the states.⁷⁴ The Supreme Court, in *Louisiana PSC*, affirmed that section 2(b) gives state regulators jurisdiction over the parts of intrastate telecommunications that can be severed from the interstate portions or are not in conflict with federal

policies.⁷⁵ By 1993, Congress, well aware of the *Louisiana PSC* interpretation of section 2(b),⁷⁶ expressly amended this statutory "fence" to specify that the intended boundaries of its regulatory framework for CMRS were national. The law's revised wording states that: "Except as provided in . . . *section 332*, . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier" ⁷⁷

Thus, the revision of section 2(b) contained in the 1993 Act expressly provides that the traditional reservation of state authority over intrastate services does not extend to those services insofar as they are covered by section 332; that is, state authority does not extend to CMRS because it is the subject matter of section 332, which establishes an exclusively federal jurisdictional scheme. This section also shows that, contrary to some recent interpretations,⁷⁸ the 1993 Act's "fencing out" of state jurisdiction does not merely encompass CMRS "rates and entry." Instead, Congress intended the FCC to have jurisdiction over wireless "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio"—leaving very little territory for the state regulators to legally "fence in." In fact, all that is left for states under the law are "other terms and conditions."⁷⁹

d. Limitation on State Universal Service Programs

The portion of section 332 applicable to the goal of "universal service"⁸⁰ also reveals Congress's cognizance of the necessity of a national regulatory scheme for mobile service providers. The universal service exception contained in section 332(c)(3)(A) for CMRS reads as follows:

Nothing in this subparagraph [Section 332(c)(3)] shall exempt providers of commercial mobile service (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.⁸¹

Thus, where CMRS services are *not* a substitute for landline telephone exchange service for most of a state's communications (the current pervasive reality), Congress intended CMRS providers to be exempt from intrastate universal service obligations.⁸² In envisioning the possibility that CMRS might one day serve as a substitute for traditional local landline service, Congress provided for the possibility that state universal service programs or other state funding obligations might apply. In addition, the 1993 amendment to section 2(b), eliminated any "intrastate" category of CMRS service that could be covered by an intrastate universal service program. CMRS is now jurisdictionally interstate, and so it will remain unless Congress revises its present status.

The *Universal Service Report and Order*⁸³ adopted by the Commission pursuant to the Telecommunications Act of 1996 established a federal fund for the support of universal service and acknowledged that states may establish state funds to support universal service. The Commission also ruled that CMRS providers may be required to contribute to support state and federal universal service programs.⁸⁴ However, the *Universal Service Report and Order* (and subsequent orders on reconsideration) fails to give effect to the statutory provisions that distinguish CMRS providers from other providers of telecommunications services. Instead, the Commission has adopted the view that states have authority over CMRS for purposes of establishing and administering state universal service programs. Under a comprehensive reading of the entire statute, however, while wireless providers may be required to support universal service programs, the legal framework established by Congress permits *only* the Commission to impose such requirements.

In drawing a distinction between CMRS and landline local telephone service, Congress expressly chose to exempt CMRS providers from state-imposed universal service obligations. Although the 1996 Act specifically empowered the Commission to adopt universal service rules for interstate services, it did not authorize states to impose similar requirements upon CMRS providers. Under Congress's approach, CMRS operators would not escape the obligation to contribute to the support of universal service. They would, however, participate through a unitary federal mechanism

rather than subject themselves to a patchwork of fifty varying state mechanisms. Congress specified this approach because, as reflected in the 1993 Act, it recognized that jurisdictional separations of traffic on mobile networks would be administratively burdensome, costly, and complex, given that mobile wireless networks will at any one moment have a constantly changing mix of calls within and across state boundaries.

The 1996 Act did not change this approach. In the 1996 Act Congress adopted section 254(f), which states:

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State.⁸⁵

The Commission has interpreted this language as providing that states may require CMRS providers to contribute to state universal service plans.⁸⁶ However, the Commission has supplied scant reasoning or analysis for this interpretation except to say that the Joint Board on Universal Service and the California PUC⁸⁷ adopted that interpretation. The Commission agrees with them, but it does not say why. With respect to another similarly unsupported Commission directive, the U.S. Court of Appeals for the District of Columbia said, "[t]he FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking."⁸⁸

In addition, exposing CMRS providers to state universal service levies undermines the public interest. In some less developed countries, mobile telephones are being used as a substitute for landline telephone service.⁸⁹ Wireless services could eventually become a viable substitute for landline telephone service in some areas of this country, particularly in rural areas. It is impossible to predict when CMRS will become a substitute for local wireline service. As it exists today, however, CMRS in the United States is not a substitute for wireline telephone service.

So far, recent events indicate that a number of states may apply extraordinarily high universal service levies that will impair the growth of the industry. Kansas, for example, issued a decision in December 1996 that proposed a universal service levy on all intrastate retail revenues of CMRS providers amounting to 14.1% per year.⁹⁰ Such levies will push rates upwards. California has established a seven percent levy on telecommunications revenues.⁹¹ If two adjacent states adopted assessment rates that differ as much as California and Kansas, users in low levy states could find their rates indirectly affected by their neighbors' higher levy.

To date, the Commission has issued a total of four reconsideration orders in response to various objections and requests for reconsideration since its first *Universal Service Order*.⁹² In its latest reconsideration order, the Commission rejected several petitioners' arguments that section 332(c)(3)(A) of the 1996 Act limits a state's ability to impose universal service contribution requirements on CMRS providers. The Commission merely restated its conclusion⁹³ that a state provision requiring CMRS providers to contribute on an equitable nondiscriminatory basis to universal support mechanisms is a permissible regulation of "other terms and conditions" under section 332(c)(3)(A) rather than rate or entry regulation. The Commission also reaffirmed its interpretation of section 332(c)(3)(A) that states are *not* required to find that CMRS is a substitute for landline service as a prerequisite to imposing universal service support requirements on wireless providers. The Commission held that the later-enacted section 254(f) requiring all telecommunications carriers that provide intrastate telecommunications to contribute to state programs would trump section 332(c)(3) in the case of any conflict.⁹⁴ The Commission rejected the argument that state universal service mechanisms should not apply to CMRS providers due to wireless services' inherently "interstate" nature without support.⁹⁵

However, the Commission somewhat inconsistently concluded that CMRS providers should be permitted to recover universal service contributions through rates charged for all CMRS services. In the Commission's view, section 332(c)(3)'s modification of the "traditional" federal-state relationship in the CMRS context (by prohibiting states from regulating rates for intrastate CMRS services), permitting recovery through rates on intra- and interstate commercial mobile services would not constitute an impermissible intrusion on state rights. The Commission seems to recognize

federal displacement of state authority, but seems unwilling to acknowledge that it does not intrude on state interests. Congress's choice is decisive, and final. To carry out Congress's expressed intent, at the very least the Commission should, as a practical matter, provide a simple, straightforward method by which the Commission and the fifty states can collect CMRS universal service levies. The Commission also should recognize that above a certain level, any such levy would constitute a barrier to entry in violation of section 253 of the 1996 Act.

D. The Telecommunications Act of 1996

Three years after the passage of the 1993 Act, Congress turned to the broader communications landscape in the Telecommunications Act of 1996. Its main objective was to overhaul the regulations and laws affecting the provision of local telecommunications service in the United States. In mandating sweeping regulatory changes for the industry, Congress explicitly maintained the Commission's CMRS authority under section 2(a) and section 332(c)(3) and turned its legislative attention in the 1996 Act to the entrenched local monopolies held by incumbent local exchange carriers.⁹⁶ Also in the 1996 Act, as discussed above, Congress adopted the specific universal service provision in section 254(f) for the purpose of ensuring continued availability of affordably priced essential telecommunications services and ultimately advanced services to U.S. consumers.

However, nothing in the 1996 Act undercuts the "hog tight, horse high, and bull strong"⁹⁷ federal regulatory CMRS framework predicated upon amended section 2(b) and section 332 that we have described. In fact, section 601(c)(1) of the 1996 Act states that Congress did not intend to amend existing law, such as the 1993 Act. Congress provided: "This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."⁹⁸

In addition, section 253(e) of the 1996 Act (which was a part of section 254 at an earlier stage in the legislative drafting process⁹⁹) specifically addresses the continued viability of section 332 by stating that "[n]othing in this section shall affect the application of 332(c)(3) of this title to commercial mobile service providers."¹⁰⁰ In addition to these explicit provisions in the 1996 Act, two principles of statutory interpretation also support the view that the FCC's jurisdiction over CMRS is complete. First, the repeal of laws by implication is disfavored; and second, general provisions (e.g., section 254) are subordinate to and must be interpreted in light of more specific provisions (e.g., section 332(c)(3)).

While some may argue that section 251 of the 1996 Act expressly *maintains* state power over local calls, the key point to remember is that Congress *took away* state power over intrastate CMRS in the 1993 Act, and did nothing to restore that power in the 1996 Act. Thus, to assert state jurisdiction over CMRS predicated upon the Telecommunications Act, one must ignore the 1993 Act's explicit authorization of a federal CMRS regulatory scheme. If Congress had intended to return jurisdiction to the states in the 1996 Act, an explicit provision would have been required to accomplish this task.

III. The Problems: Misguided Legal Analyses and State Regulatory Burdens

As the preceding sections have demonstrated, the 1993 Act's amendments to the 1934 Act embody congressional recognition of the need to establish a federal statutory framework that allows the U.S. wireless communications industry to flourish. In practice, however, realization of federal objectives has been problematic. Unfortunately, some courts and state and local regulators cling to a belief that the traditional common carrier classification should apply to both wireline and wireless carriers, regardless of their market penetration and the nature of their services. The misunderstandings emerging from both of these sources pose serious threats to the realization of Congress's regulatory objectives for CMRS. These attempts by some courts and state and local entities to shackle new wireless services to old regulatory categories not only frustrate the congressional wireless vision, but also hinder the growth of this emerging industry.

Thus far, the breadth of this federal regulatory framework has not been spelled out by the Commission. While the statutory language imposes a presumption that CMRS is common carriage, the Commission could selectively eliminate many traditional common carrier regulatory requirements imposed on CMRS. Moreover, a few

recent decisions have relied mistakenly on a traditional section 2(b) preemption analysis, rather than a close reading of the Communications Act amendments of the 1993 Act, to limit the Commission's jurisdictional authority over CMRS. The failure of the FCC to frame properly and directly address the unique legal status of CMRS thwarts achievement of congressional goals and the prospects for the industry's domestic growth.

A. *Conflicting Court and Commission Decisions*

One of the first opportunities to address the scope of FCC authority over CMRS providers arose in *Connecticut Department of Public Utility Control v. FCC*.¹⁰¹ The dispute that gave rise to the litigation is rooted in the FCC's 1995 decision to deny the state public utility commission's petition to regulate the rates charged by commercial mobile service providers operating within the state.¹⁰² The state commission, while acknowledging the FCC's grant of authority to determine whether "market conditions with respect to [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates," alleged that the FCC was bound to follow the explicit factors enunciated in its Second CMRS order.¹⁰³ In essence, the state commission claimed that because the list of factors did not specifically include the "present-day impact of future market entry" in evaluating current market conditions, the FCC was precluded from considering this as a factor in denying Connecticut the ability to continue to regulate intrastate CMRS rates.¹⁰⁴

In confirming the legality of the FCC's actions, the *Connecticut DPUC* court focused on the changes Congress had made to the 1934 Communications Act with the provisions of the 1993 Act so as to "dramatically revise the regulation of the wireless telecommunications industry" ¹⁰⁵ The court identified the importance of the federal regulatory scheme and the necessity of preventing conflicting and "balkanized" state regulations from impeding this goal.¹⁰⁶ Accordingly, the court, acknowledging the expansive scope of the FCC authority over the regulation of CMRS providers, concluded that, although this particular factor had not been listed, it was "entirely appropriate for the Commission to take into account the present-day impact of future market entry in evaluating whether current market conditions are inadequate to protect consumers."¹⁰⁷

Shortly after the *Connecticut DPUC* decision, the Connecticut courts, in *Metro Mobile CTS v. Connecticut Department of Public Utility Control*,¹⁰⁸ were again called upon to evaluate the propriety of state regulation in light of the 1993 Act amendments. This case involved a challenge to a state commission decision requiring CMRS providers to contribute to a state universal service fund established under the universal service provisions adopted in the 1996 Act. Specifically, the court assessed the interplay between the two section 332(c) phrases: (1) "this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services" and (2):

Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such state) from requirements imposed by a state commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.¹⁰⁹

Consistent with *Metro Mobile*, the court placed great emphasis on the statutory language and the established principle that "rules of statutory construction require that no language in a statute be read to be redundant."¹¹⁰ Using these familiar tools of judicial analysis, the court found the correct interpretation of the interplay between the two provisions to be as follows:

Because the former excerpt from the Preemption Clause grants to the states the authority to regulate "other terms and conditions" of cellular service, the latter excerpt, which expressly exempts from preemption any assessments for universal and affordable service where cellular service is a significant substitute for land line service, would be redundant if such assessments were among "other terms and conditions" of cellular service and thereby already exempt.¹¹¹

Accordingly, the court decided that:

[b]y expressly *exempting from preemption* those assessments which are made on cellular providers in a state in which cellular service is a substitute for land line service, Congress left no ambiguity that cellular providers in states in which cellular is not a substitute for land line service fall under the umbrella of federal preemption.¹¹²

The court found, therefore, that the 1993 Act amendments prohibited the state commission from assessing Metro Mobile (a cellular carrier) for payments to the state Universal Service and Lifeline Programs for interstate services.

Despite this initial judicial recognition of FCC plenary jurisdiction over CMRS providers, other decisions have been hostile to the federal program established by Congress. A review of these decisions reveals that they contain erroneous conclusions drawn from a complex and poorly understood body of law. This problem has been particularly acute with regard to the application of state universal service obligations to CMRS service providers.

In *Mountain Solutions, Inc. v. State Corp. Commission of Kansas*,¹¹³ a U.S. District Court considered the interplay between section 332(c)(3)(A) and section 254(f) seeking to determine the propriety of requiring CMRS providers to contribute to a state-sponsored universal service fund in Kansas.¹¹⁴ Broadly stated, the question was whether section 332(c)(3)(A) exempted CMRS providers from the section 254(f) provision allowing states to require intrastate telecommunications providers to contribute to state universal service funds. The court rejected the petitioners' argument that section 332 prohibits states from requiring CMRS providers to contribute to state universal service funds¹¹⁵ and held that the preemptive reach of section 332 was limited.¹¹⁶ This result is surprising in light of the fact that the court recognized that "[i]n interpreting statutes, courts must not be guided by a single sentence or portion of a sentence, but must look to the provisions of the whole law, and to its object and policy."¹¹⁷

Had the court considered the provisions of the entire Communications Act, it would have realized that plenary jurisdiction vested in the FCC through the interplay between sections 2(b) and 332. Unfortunately, despite the recognition of this principle of jurisprudence, the court chose to ignore, rather than apply it—an ironic result considering the court's statement that its "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive."¹¹⁸ Even more alarming is that, in failing to give effect to the congressional mandate, the court asserted that "[s]uch a broad interpretation, however, would have the effect of gutting nearly all regulatory authority over wireless telecommunications providers, a result that Congress did not envision."¹¹⁹ This language stands in stark opposition to the judicial recognition of the proper role of the judiciary, a role that was recently acknowledged by the Eighth Circuit when it explained that some decisions are the "Constitutionally-assigned prerogatives of the Legislative Branch of our national government."¹²⁰ In this case, the Kansas federal district court simply ignored Congress's exercise of its constitutional prerogative.

Another recent case, *GTE Mobilnet of Ohio v. Johnson*,¹²¹ demonstrates the difficulties a court can encounter when it applies a traditional section 2(b) preemption analysis in the CMRS context instead of analyzing the revised federal framework established by Congress by the 1993 Act amendments. However, the case also reveals that important state interests can still be addressed even when a strong interpretation of sections 2(b) and 332 is adopted.

In *GTE Mobilnet*, the jurisdictional dispute arose when Cellnet, a cellular reseller, filed a complaint with the state commission alleging that GTE Mobilnet and New Par, cellular carriers, engaged in discriminatory and anticompetitive conduct¹²² and requested that the commission order the companies to cease charging lower rates to affiliated entities that competed directly with Cellnet.¹²³ In federal district court, the defendant companies filed for an injunction to prevent the state commission from adjudicating the case. Specifically, GTE Mobilnet and New Par argued that section 332(c)(3)(A) explicitly preempted the state commission from hearing the case because the relief sought would involve rate regulation by the state commission.¹²⁴ Cellnet appealed the grant of the preliminary injunction claiming that because section 332(c)(3)(A) did not facially preempt state law, the district court, under *Younger v. Harris*¹²⁵ and *Railroad Commission v. Pullman Co.*¹²⁶ should have abstained from hearing the dispute and allowed the state commission to determine the preemption issue.¹²⁷

The court found that section 332(c)(3)(A) did not present a facially conclusive instance of preemption.¹²⁸ In doing so,

it examined whether an FCC conclusion that "market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory"¹²⁹ indicates congressional intent to preempt the regulation of discriminatory rates by state commissions. After rejecting such an interpretation, the court assessed whether the two-prong test established in *CSXT, Inc. v. Pitz*¹³⁰ required abstention.¹³¹ This analysis first involved determining whether state and federal courts possess concurrent jurisdiction and, if so, then determining whether adjudication at the state level is preferable under the *Younger* principles.¹³² After determining the existence of concurrent jurisdiction¹³³ and the existence of ongoing state proceedings simultaneously implicating important state interests and presenting adequate opportunities to raise constitutional issues,¹³⁴ the court concluded the federal district court should have abstained and permitted the state commission to determine the preemption issue.¹³⁵

The fundamental question raised by this case and ignored by the appellate court was whether allegedly discriminatory rates constitute a rate-making question or a consumer protection/antitrust issue subject to state jurisdiction pursuant to section 332's "other terms and conditions" language. The resolution of disputes regarding discriminatory rates traditionally has been reserved for the FCC under section 202 of the Communications Act.¹³⁶ As such, the court's determinations depart from established precedent and fail to recognize the uniquely "federal" aspects of the claim. While state law may address such activities under broader consumer protection legislation, claims of "discriminatory pricing" fall squarely within the Commission's jurisdictional domain. To the extent, therefore, the case supports consideration of such claims by state courts, its results and reasoning should be criticized.¹³⁷

Despite the conflicting decisions coming out of some courts, there have been decisions that recognize Congress's intent. The Eighth Circuit's decision in *Iowa Utilities* is the most recent decision exemplifying this approach.¹³⁸ While the court's eventual opinion invalidated the majority of FCC pricing rules so as to uphold state jurisdiction over common carrier intrastate landline services, the court also squarely confronted the interplay between section 152(b) and section 332 and reached a very different conclusion as to CMRS providers than the *Mountain Solutions* and *GTE Mobilnet* courts. The court unequivocally acknowledged Congress's intent to create a federal regulatory framework for CMRS and resolved the issue by stating:

Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by [CMRS] providers, *see* 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers Thus, [the FCC's interconnection rules] remain in full force and effect with respect to the CMRS providers, and our order of vacation does not apply to them in the CMRS context.¹³⁹

The *Iowa Utilities* decision's wireless conclusions are particularly persuasive. Emphasizing the need to focus on a "plain reading" of the statute, the court realized the irrelevance of attempting to rely on preemption analysis or the impossibility exception when it came to the wireless industry.¹⁴⁰ Instead, after affirming that "section 2(b) remains a *Louisiana* built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf,"¹⁴¹ the court recognized that "Congress is fully capable of opening the gate in the 2(b) fence . . . when it wishes to do so."¹⁴² Indeed, the court acknowledged that Congress had not only recognized the need to open the *Louisiana PSC* gate so as to allow the wireless industry to flourish, but had in fact done so with the 1993 Act amendments.¹⁴³

While the decision in *Iowa Utilities* is indicative of how this watershed jurisdictional debate should play out in the future, a recent FCC decision exemplifies the pitfalls of failing to take into account the entire CMRS regulatory framework crafted by Congress. In the *Pittencrieff Order*,¹⁴⁴ the FCC examined the interplay between sections 254(f) and 332(c)(3)(A) to determine whether the State of Texas could require CMRS providers to contribute to a state-run universal service fund assessed on intrastate telecommunications revenues. The FCC denied Pittencrieff Communications's petition for a declaratory ruling requesting that the FCC use its section 332 authority to preempt certain sections of the Texas Public Utility Regulatory Act of 1995 that requires CMRS providers operating in Texas

to contribute to the state universal service fund. The FCC determined that nothing in section 332 precludes states from requiring CMRS providers to contribute on an "equitable and nondiscriminatory basis" to state universal service mechanisms. The FCC relied on the *Universal Service Report and Order*¹⁴⁵ for its conclusion in the *Pittencrieff Order* that section 332(c)(3) does not preempt the State of Texas from requiring CMRS providers to make intrastate-based universal service contributions.¹⁴⁶ The FCC stated: "We affirm the decision in the Universal Service Order on this issue and find that Section 332(c)(3) does not preempt Texas from requiring CMRS providers to contribute to state universal service mechanisms such as the [Texas] Telecommunication Infrastructure Fund or the [Texas] Universal Service Fund."¹⁴⁷

The *Pittencrieff Order* purports to justify the FCC's decision permitting state universal service assessments as follows:

The second sentence [of 332(c)(3)] sets forth a specific exception for universal service rate and entry regulation where CMRS is a substitute for land line telephone exchange services for a substantial portion of the communications within such State. That is, states generally are precluded from regulating the rates that CMRS providers may charge in order to recover their universal service support contributions except where CMRS serves as a substitute for a land line service. Thus, we find . . . that the second sentence refers to a state's exercise of authority that would otherwise constitute prohibited regulation of rates or entry, and that the second sentence does not affect a state's ability to require universal service support contributions¹⁴⁸

This interpretation, however, is unsupported by the unambiguous language of section 332. Contrary to the result-oriented interpretation offered by the Commission, the second sentence of section 332(c)(3) confirms state authority to impose nondiscriminatory "requirements" (not rate recovery mechanisms or surcharge obligations) on CMRS providers "to ensure the universal availability of telecommunications services at affordable rates."¹⁴⁹ The appearance of this sentence in a section that otherwise addresses the preemption of state ratemaking authority does not alter its meaning. This sentence was added to ensure general limitations on state ratemaking authority would not extend to "requirements" with respect to universal service, provided the condition in the parenthetical was satisfied. In addition, the FCC concludes that "[i]f we were to read section 332(c)(3) to preclude CMRS providers from making contributions to state universal service support mechanisms . . . that reading would contradict the direct language of section 254(f) that 'every telecommunications carrier' must contribute."¹⁵⁰ However, two principles of statutory construction stand in direct opposition to this view: (1) the repeal of laws by implication is disfavored; and (2) general provisions are subordinate to more specific ones.¹⁵¹ Because the 1996 Act mandates that section 332 remains in full effect except where expressly amended, the more general universal service enactment in section 254 does not override section 332's provisions relating to CMRS providers' state universal service obligations.

Citing the statute's legislative history, the FCC also concluded in the *Pittencrieff Order* that the Texas universal service provisions fell within the "other terms and conditions" language of section 332(c)(3)(A) and is neither a rate regulation nor an entry regulation.¹⁵² However, the *Pittencrieff Order* interprets the relevant legislative history incorrectly. The House Report on the 1993 Budget Act amendments demonstrates that Congress intended the states to regulate only those "other terms and conditions" that fall within the state's "lawful authority." As noted previously, the legislative history provides an express list of "other terms and conditions" which may be deemed within a state's lawful authority: "customer billing information and practices and billing disputes and other consumer protection matters; facility siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis" ¹⁵³ The list makes no mention of universal service. An examination of this House Report list of terms and conditions considered to be within a state's lawful regulatory authority (i.e., within a state's police powers) reveals that state-imposed universal service assessments on wireless carriers fall well outside of the congressionally-mandated scope of a state's lawful regulatory authority.¹⁵⁴

Applying a "plain meaning" reading to the statute yields the same conclusion reached by the Connecticut court in *Metro Mobile*: if state universal service levies were also considered to be "other terms and conditions" the first sentence of section 332(c)(3)(A), exempting state authority over "other terms and conditions" from preemption, would render the second sentence in section 332(c)(3)(A) wholly redundant.¹⁵⁵ Thus, adopting the FCC's *Pittencrieff Order* reading of the statute leads to an incongruous result: states would be allowed to regulate "other terms and conditions"

of CMRS services in the section's first sentence and then again be permitted to impose these same regulations on CMRS providers through the section's second sentence.

Besides conflicting with the statute's legislative history and accepted principles of statutory interpretation, imposing state universal service levies on CMRS providers' inherently *interstate* telecommunication services does not constitute a lawful state activity. The FCC's *Pittencrieff Order* can be read as broadening the concept of "other terms and conditions" appropriate for state regulation to such an extent that very little of substance would be left within the FCC's regulatory sphere.¹⁵⁶ Such a sweeping expansion of state jurisdiction would undermine the regulatory framework and goals adopted by Congress in the 1993 and 1996 Acts. Such a misreading of sections 2(b) and 332 would also interpose significant hurdles in the path of the wireless industry's competitive development.

Unlike the *Iowa Utilities* decision, the *Pittencrieff Order* did not consider section 2(b) in its analysis and instead focused on sections 332 and 254 exclusively. Perhaps because of this crabbed approach, the FCC upheld the state universal fund contribution requirement at issue and failed to recognize that Congress has explicitly "opened the gate" for federal CMRS regulation. The *Pittencrieff* petition was filed before the enactment of the 1996 Act and could not take into account the Eighth Circuit's CMRS findings in *Iowa Utilities*. Because the case fails to make use of the full regulatory tapestry woven for CMRS by Congress (i.e., sections 2(b), 254, and 332), the FCC has ignored Congress's 1993 requirement that CMRS operate under federal regulation. This approach may be attributed to the Commission's concerns about political objections from states if they are unable, even temporarily, to impose universal service obligations on CMRS providers.¹⁵⁷ By failing to recognize that Congress explicitly "opened a gate" for FCC regulation of the CMRS industry and "fenced in" this area for the FCC, the decision allows Texas (and other states) to ignore the law and Congress's intent, thereby imposing a financial burden on wireless operators despite their limited market penetration compared to wireline operators.

The unwillingness of the Commission to rely on the jurisdiction found by the Eighth Circuit exposes Pittencrieff Communications and all CMRS providers to unnecessary financial burdens and the technically daunting, if not impossible, task of attempting to allocate their intra- and interstate revenues. The 1996 Act yields no indication nor technological reason to speculate that Congress in any way intended this result. In fact, section 254(f) of the 1996 Act (the intrastate universal service provision) applies by its terms only to intrastate telecommunications, while CMRS service, if properly understood, is an interstate telecommunications service. Congress, thus, did not create a conflict between sections 332 and 254. Rather, Congress explicitly stated in section 601(c)(1) of the 1996 Act that the previously established law was to remain in effect.¹⁵⁸

Perhaps illuminating a path out of the *Pittencrieff Order*'s analytical labyrinth, the District of Columbia Circuit Court of Appeals issued three recent nonwireless opinions exhibiting the sort of jurisdictional and statutory analysis centered on congressionally expressed meaning advocated by the Authors. In *Illinois Public Telecommunications Ass'n v. FCC*,¹⁵⁹ the court evaluated challenges to an FCC order "revamping the regulatory regime for the payphone industry pursuant to the Telecommunications Act of 1996."¹⁶⁰ Having decided that allowing market forces to set the prices for local calls would best ensure fair compensation for providers,¹⁶¹ the FCC ordered the deregulation of the local market unless "a particular State could demonstrate that competition would not constrain prices, because, for example, payphones at certain locations could be priced at monopoly rates."¹⁶² Because the 1996 Act gave the FCC authority to act only with respect to those calls for which payphone service providers (PSPs) were not already fairly compensated, the FCC first determined for which type of calls PSPs were not being fairly compensated. Because local coin calls fit that description,¹⁶³ the Commission exercised authority to regulate these calls despite the section 152 prohibition against federal regulation of "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."¹⁶⁴

State regulatory commissions and the National Association of the State Utility Consumer Advocates (NASUCA) challenged the Commission's decision on the grounds that the FCC lacked the authority to preempt the states from regulating local markets.¹⁶⁵ The court squarely confronted the issue of whether section 276 of the 1996 Act expanded FCC jurisdiction in the absence of an accompanying express amendment of section 2(b).¹⁶⁶ To answer this question, the court focused on the use of the word "compensation" and the way in which this term had been utilized elsewhere in

the statutory scheme.¹⁶⁷ This analysis revealed that because there was no indication of congressional intent to exclude local coin rates from the section 276 term "compensation" and the only compensation a PSP receives from local calls is generally the coins deposited, the statute "unambiguously grants the Commission authority to regulate the rates for local coin calls."¹⁶⁸ As the Court noted:

The Supreme Court has held that "[t]he crucial question in any preemption analysis is whether Congress intended that federal regulation supersede state law."

....

... [T]he only question is whether in § 276 [of the 1996 Act] the Congress gave the Commission the authority to set *local* coin call rates in order to achieve that goal [of 'fair compensation' for payphone operators]. We conclude that it did.¹⁶⁹

Thus, relying on a holistic reading of the statute, the court upheld FCC jurisdiction over traditionally intrastate subject matter in the absence of any overt amendment to section 2(b). The Supreme Court recently allowed the decision of the D.C. Circuit to stand.¹⁷⁰

Subsequently, in *Bell Atlantic Telephone Co. v. FCC*,¹⁷¹ the D.C. Circuit examined the interplay between two potentially conflicting sections of the 1996 Telecommunications Act¹⁷² in determining the propriety of an FCC Order regarding the scope of permissible activities for the Bell Operating Companies.¹⁷³ The court applied the analytical framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*¹⁷⁴ to determine the proper method of review of agency interpretation of a statute which the agency administers.¹⁷⁵ Accordingly, the court first sought the "plain meaning" of the statute by using the "'traditional tools of statutory construction" to determine whether Congress has spoken to the precise question at issue"¹⁷⁶ so as to preclude judicial deference to the agency interpretation.¹⁷⁷ After using these "traditional tools of construction" in an attempt to ascertain congressional intent, the court found the statute ambiguous and proceeded to the *Chevron* analysis' second step—determining whether the Commission's interpretation was "reasonable and consistent with the statutory purpose and legislative history."¹⁷⁸ This step involved considering the text, legislative history, and congressional purpose to determine whether the FCC had adopted a permissible interpretation.¹⁷⁹ Additionally, the court sought to determine whether Congress had either explicitly or implicitly delegated interpretive authority to the FCC.¹⁸⁰ After declaring that "[b]y declining itself to strike an exact balance between the commands of § 272(a)(2) and § 272(e)(4), Congress implicitly delegated to the Commission the authority to accommodate the interests at stake through its own interpretation of the statute"¹⁸¹ and noting that the Commission's interpretation was both reasonable and consistent with the legislative history¹⁸² and purpose,¹⁸³ the court deferred to the FCC interpretation of the appropriate interplay between the two statutory provisions.¹⁸⁴

Most recently, in *SBC Communications v. FCC*, the D.C. Circuit adopted a jurisdictional approach analogous to that advocated by the Authors for evaluating the relationship between the FCC and state regulatory bodies under section 271(c)(1) of the 1996 Act. Similar to the amendments Congress passed in 1993 in section 332 (c)(3), Congress in 1996 expressly designated the interLATA long-distance services at issue in section 271 as subject to exclusive Commission jurisdiction. The court found that Congress's statutory assignment of jurisdictional responsibility made further inquiry along the *Louisiana PSC* "fence lines" to be wholly inappropriate:

Nor is the Commission obliged to defer to the OCC's [Oklahoma Corporation Commission's] judgment that SBC satisfied Track A. Although the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight. Unless the FCC concludes to its own satisfaction that the applying BOC has satisfied either Track A or Track B, as well as the other statutory requirements, it "shall not approve authorization." *Louisiana Public Service Commission*, which holds that matters in connection with interstate service are "fence[d] off from FCC reach," simply does not apply in this case. Congress has clearly charged the FCC, and not the State commissions, with deciding the merits of the BOC's requests for interLATA authorization, and

interLATA service is typically *interstate*. For these reasons, we uphold the Commission's determination that SBC's application did not satisfy Track A's requirements.¹⁸⁵

While the circuit court's reliance on such statutorily expressed congressional intent to determine state-federal jurisdictional boundaries for communications regulation is apt, as some of the caselaw reviewed in this Article shows, the courts and Commission have by no means adopted a uniform analytical approach to issues presented by the Communications Act, as amended. These divergent perspectives adopted by courts and regulators have left wireless providers with scant certainty as to how and by whom they will be regulated.¹⁸⁶ New technology is therefore being shackled by old landline requirements and the intra-/interstate, dual regulatory scheme, and both judges and commissioners are experiencing difficulties in adopting a consistent and coherent interpretation of Congress's intent for a federal CMRS regulatory framework. While the issue may be resolved by the Supreme Court during the 1998-99 term,¹⁸⁷ both courts and the FCC would be served best by an approach (similar to the D.C. Circuit's) that looks to Congress's expressed intent and the unique technologies embodied by the wireless industry to serve the public interest of American consumers.

B. State and Local Anticompetitive Burdens on CMRS Providers

In addition to the divergent approaches taken by some courts and the FCC, another significant problem has been the historic tendency of state commissions to place high burdens on CMRS providers. A review of the past and present regulatory landscape reveals not only that some states have attempted to abuse traditional police and taxing powers, but that several states have enacted legislation that demonstrates a near total disregard for federal law. Additionally, several states' attempts to apply the traditional inter-/intrastate dichotomy for regulatory purposes have forced industry innovators to expend needless time and financial resources in administrative and judicial litigation. These burdensome state regulations show the necessity and wisdom of Congress's decision to take a "national view"¹⁸⁸ toward the regulatory framework for CMRS providers.

1. Local Zoning

Faced with the realization of exclusive federal jurisdiction over CMRS providers, states have seized on their perceived remaining authority by imposing moratoria on the siting of additional transmitters within their localities. These local actions are ostensibly grounded in section 332(c)(7)(A) which provides: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities."¹⁸⁹

Rather than signaling a significant augmentation of state power, however, the legislative history of the 1993 Act and entire statutory scheme contained in the 1996 Act reveal that section 332(c)(7)(A) represents Congress's desire to ensure that burdensome zoning restrictions are not used to derail the development of the wireless communications industry.

The legislative history of the 1993 Act illustrates that, had Congress intended for states to retain unrestricted zoning authority, the 1996 Act's statutory grant of power would have been unnecessary. Specifically, the 1993 Act's legislative history demonstrates that the phrase "other terms and conditions" in section 332(c)(3)(A) was meant to include zoning authority.¹⁹⁰ If Congress had sought to maintain the status quo, it could have dispensed with the provisions of the 1996 Act relating to zoning authority. Instead of preserving the status quo, however, Congress severely blunted this potential sword of state regulators to ensure this authority did not derail federal objectives. Although section 332(c)(7)(A) initially appears to preserve unfettered state regulatory discretion, the long list of exceptions in section 332(c)(7)(B) reveals that the limiting phrase "[e]xcept as provided in this paragraph," actually signals a significant shrinking of state regulatory authority. In essence, the exceptions swallow the grant of authority.¹⁹¹

Congress limited state and local authority by imposing both substantive and procedural limitations on the exercise of this retained power. Congress proclaimed that regulations concerning the placement, construction, and modifications of wireless service facilities shall neither "unreasonably discriminate among providers of functionally equivalent services"¹⁹² nor "prohibit or have the effect of prohibiting the provision of personal wireless services."¹⁹³

Additionally, Congress's desire to save service providers from continuous costly litigation resulted in the admonition against regulating facility placement, construction, and modification "on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such regulations."¹⁹⁴ To protect the public against the harmful effects of inappropriate state and local zoning restrictions, Congress imposed procedural requirements for state and local authorities to follow when acting on a request to improve service facilities. Specifically, Congress mandated that the locality act within a "reasonable period of time" on any request¹⁹⁵ and that the decision be in writing¹⁹⁶ and supported by "substantial" evidence.¹⁹⁷ Finally, in recognizing the threat of endless entanglement in administrative hearings, Congress provided that "[a]ny person adversely affected by any final action or failure to act . . . may . . . commence an action in any court of competent jurisdiction" and required the court to "hear and decide such action on an expedited basis."¹⁹⁸

Unfortunately, despite the plain meaning of the statutory language and obvious congressional intent, states are continuing to use zoning regulations to prevent the entry of CMRS providers into local markets.¹⁹⁹ While the sheer number of moratoria is alarming, the greater threat to the wireless industry comes from the rate at which states and localities are attempting to use these moratoria to evade the section 253(a) prohibition against regulations that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²⁰⁰ Despite the repeated arguments of states and localities that siting moratoria are not being employed to prohibit the expansion of the telecommunications industry, the substantial costs incurred by CMRS providers forced to await the lifting of or challenge the moratoria alone highlights the anticompetitive effects of such state action.²⁰¹

Fortunately, there has been a growing judicial recognition of the detrimental nature and illegality of these moratoria. Therefore, despite an early decision in *Sprint Spectrum, L.P. v. City of Medina*,²⁰² which gave state commissions hopes of using these methods to stall or thwart the placement of wireless radio towers, many courts realize the punitive nature of these moratoria and are expressly disavowing the persuasiveness of that holding.²⁰³ Specifically, courts are repeatedly stressing that the *Medina* decision was justified because the moratoria had been issued five days after the enactment of the 1996 Act and therefore "seeking time to deal with an expected flurry of applications,"²⁰⁴ it constituted a "*bona fide* effort to act carefully in a field with rapidly evolving technology."²⁰⁵ These decisions indicate that as time passes, attempts to justify these moratoria probably will fail.²⁰⁶ In addition, courts will recognize the importance of the procedural requirements²⁰⁷ and the need to avoid judicial endorsement of efforts that effectively prohibit wireless services²⁰⁸ and unreasonably discriminate among service providers.²⁰⁹ In essence, courts are likely to appreciate the *Jefferson County* recognition that "[t]he series of moratoria issued by the Commission represent an anti-competitive impediment to expansion of communication services" ²¹⁰ Finally, increased judicial recognition of these attempts to evade the congressional mandates may result in courts taking a more active role in fostering the development of the wireless industry.²¹¹

2. State and Local Taxes

While the above-mentioned zoning restrictions are the most prevalent form of regulations that impede the congressional goal of a national telecommunications infrastructure, states also are using their taxing authority in a way that may hinder the development of mobile services.²¹² While the ability of a state to use its taxing authority legitimately is beyond dispute,²¹³ the prohibition against state interference with CMRS providers' attempts to enter the market has twice been explicitly stated by Congress. In 1993, Congress codified this admonition by mandating that "no State or local government shall have any authority to regulate the entry of . . . any commercial mobile service or any private mobile service" ²¹⁴ While the 1993 Act amendments referred solely to wireless communications, Congress's realization in 1996 of the need to prevent state interference with the development of a national telecommunications infrastructure is evidenced by section 253(a), which provides that "[n]o 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."²¹⁵

Unfortunately, despite these legislative provisions, states are continuing to impose discriminatory and excessive

property taxes on service providers that have the effect of financially burdening wireless services and indirectly regulating future entry through the use of inflated valuations²¹⁶ and discriminatory tax exemptions.²¹⁷ The impositions of discriminatory excessive up-front assessments prior to operation discourage entry and place the new service providers at a competitive disadvantage.²¹⁸ Because "in a competitive milieu, where [mobile] services (and providers) must compete head-to-head, an excessive or discriminatory tax . . . can quickly create significant, severe competitive consequences,"²¹⁹ consumers will suffer decreased market benefits if the courts and the FCC fail to enforce the legislative prohibitions against such abuses.

3. Fees

In addition to discriminatory property taxes, states are also assessing burdensome franchise²²⁰ and rights-of-way fees²²¹ on CMRS providers—thereby claiming funds that might otherwise go toward product innovation and industry development. Although section 253(c) maintains local authority to require compensation for use of public rights-of-way,²²² basing these fees on a carrier's gross revenues²²³ violates the statutory requirement that such levies be imposed on a "competitively neutral and nondiscriminatory basis"²²⁴ and the prohibition against effectively prohibiting services.²²⁵ Additionally, local authorities have attempted to regulate the entry of CMRS providers by the imposition of exorbitant annual registration fees for the "privilege" of siting towers.²²⁶ While fees such as these often are recognized immediately as illegal attempts to regulate entry,²²⁷ wireless providers incur unnecessary costs and delays in rectifying these violations in court.

IV. State Regulatory and Judicial Deference to Congress's Federal Framework Is Required

As this examination of recent decisions and onerous regulations reveals, application of the traditional preemption analysis to CMRS issues has yielded few satisfying or coherent results. Perhaps much of the confusion and conflicting interpretations in this area stem from a mischaracterization of the problem at hand. The Commission and courts are accustomed to sizing up all conflicts between state and federal telecommunications regulations as preemption problems and asking the "either-or" question: "Is it proper for the FCC to 'preempt' state rules?" Jurists usually grapple with the tough constitutional questions associated with preemption and assess whether there is an actual conflict between the state and federal rules and whether the state regulations undercut any of Congress's expressed policy goals.²²⁸

A careful reading of the statute reveals that when it comes to CMRS regulation, courts need not reach the thorny issue of whether it is truly "impossible" to separate interstate and intrastate portions of mobile calls. Nor is the proper question to ask, "Can the FCC preempt state regulation?" but rather, "Did Congress give the FCC the exclusive power to regulate CMRS?" If the answer to the latter question is yes, there is no need to balance competing interests or analyze whether state regulation interferes with federal goals. Indeed, where Congress grants specific spheres of influence to state and federal bodies, such delegations of authority must be implemented by federal agencies and confirmed by the judiciary without modification. Such is the case with the regulation of CMRS. As explained above, the pertinent federal legislation²²⁹ unequivocally affirms the delegation to the FCC. Consequently, any inquiry into state-federal relations must focus on FCC jurisdiction rather than on preemption of state authority that has been substantially circumscribed.

The key premises outlined in this Article depict the proper CMRS regulatory framework. First, because CMRS technology is inherently interstate, state regulation based on "other terms and conditions" is inappropriate. Second, because Congress expressly carved out CMRS regulation for the FCC by statute, *Louisiana PSC*-style preemption analysis is unnecessary in determining the proper scope of state regulation. Based on the plain language of sections 2(b) and 332 of the Communications Act and legislative intent, state concerns may, and should, be taken into account by the FCC in making regulatory decisions related to CMRS. However, neither courts nor state regulators should attempt to expand to "other terms and conditions" include substantive regulatory jurisdiction.

As the Supreme Court ruled in *Louisiana PSC*, a regulatory body that lacks jurisdiction is without the power to act.²³⁰ Through the adoption and amendment of section 332, Congress has eliminated state regulatory authority over almost every aspect of CMRS. Thus, the traditional inquiry into inter-/intrastate separations is unnecessary. Accordingly,

under sections 2(b) and 332, only the FCC has the capability to enact or enforce rules or policies governing CMRS, regardless of whether they are inter- or intrastate calls.

Recently, the FCC has given strong signals that it also recognizes that the old inter-/intrastate dichotomy may be wholly inappropriate for much of today's communications technology.²³¹ In October 1997, the Commission called for comment on whether the seventy-seven year old Supreme Court decision in *Smith v. Illinois Bell*,²³² (which initially established the separations process) still has relevance in today's continually changing communications world.²³³ The FCC is seeking to determine whether "market conditions have changed so drastically since that decision as to make its holding inapplicable" ²³⁴

While the FCC is occupied by the myriad challenges of implementing the Telecommunications Act of 1996, it should not overlook the considerable role CMRS can play in introducing competition to local markets. Recent cellular subscriber growth has increased dramatically, cellular and PCS subscribership increased by exceeding 13.2 million customers in 1997, and the total wireless market is expected to grow by 61 million subscribers in five years, reaching 118 million by 2002 or 42 percent of the U.S. market.²³⁵ The decisions taken now by the Commission and the courts will determine whether wireless consumers in the coming century will experience a true golden age of added freedom and technological progress or remain grounded by the outdated distinctions of the past. To fulfill the promise that lies ahead, Congress's vision of a federal regulatory policy for CMRS must be "fleshed out" and given form both by jurists and by regulators. The FCC must enunciate reasoned principles fulfilling Congress's will to avoid state conflicts that threaten the viability of emerging wireless competitors. Indeed, the FCC must directly address these initial jurisdictional issues before both regulators and service providers are wearied by unnecessary regulation and litigation.

V. Conclusion

During the last five years, the U.S. Congress has invested an enormous amount of energy in developing telecommunications policies that promote investment and competition. The mere enactment of laws is a necessary, but not sufficient, condition to promote Congress's objectives. For example, state regulatory or court decisions that have the effect of contradicting Congress's aims will prevent competition from developing. CMRS is an important matter of general interest because these service providers are at the front of the wave of new entrants and service providers. If they succeed, then it is more likely that competition will spread and ultimately replace monopoly and regulation. It is a noble and important experiment. The Authors believe that the experiment is worth continuing until its conclusion. Experiences in other communications markets, such as the long-distance industry, have shown that under the right circumstances competition can supplant monopoly. Consistent rules and time are required, perhaps as much as a decade.

Recently, over sixty countries around the world signed the World Trade Organization basic telecommunications agreement to open telecommunications markets to competition.²³⁶ The United States was a strong proponent of that treaty. United States policy makers should be no less strong proponents of competition in the wireless market within this country. In practice, this means resisting the temptation to get the regulatory nose under the tent and relying upon market forces to address consumer needs. For a telecommunications industry that has been regulated for nearly a century, that is no small paradigm shift to accept. If the industry's promise is to be achieved, that shift is an essential one that must be maintained.

H *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). Judge Hansen of the Eighth Circuit used this phrase to describe the regulatory "fence" established by Congress in Section 2(b) of the Communications Act of 1934. 47 U.S.C. § 152(b) (1994).

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1. Oliver Wendell Holmes, *Law and the Court*, in *Collected Legal Papers* 291, 296 (1920).
2. The terms wireless and CMRS are used interchangeably in this Article unless otherwise stated. *See infra* note 7. Wireless technology can support mobile, fixed, or both uses.
3. For a general analysis of competitive conditions in the CMRS marketplace, see Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, *Second Report*, 12 FCC Rcd. 11,266, 7 Comm. Reg. (P & F) 1 (1997).
4. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (codified in scattered sections of 47 U.S.C. (1994)). Additionally, 47 U.S.C. § 332(c)(1)(A) authorizes the Commission to forebear from regulation if it concludes regulation is: unnecessary to protect consumers, inconsistent with the public interest, and unnecessary to protect against unreasonable rates. *See* Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd. 1411, paras. 124-219, 74 Rad. Reg. 2d (P & F) 835, 867-83 (1994) (discussing FCC forbearance decisions). An amendment to the Communications Act in the Telecommunications Act of 1996 also permits the FCC to forebear from regulating particular classes of telecommunications services or providers. Telecommunications Act of 1996, sec. 401, § 10(a), 47 U.S.C.A. § 160(a) (West Supp. 1997). There is not much doubt that Congress's adoption of amendments to section 332 denied states' authority over rates and entry. The Authors maintain that by also amending Section 2(b) of the Communications Act of 1934, Congress eliminated state jurisdiction over matters for or in connection with intrastate communications except for a circumscribed list of "other terms and conditions" of service.
5. President William Jefferson Clinton, Remarks at a Communications Technology Demonstration (July 22, 1993), in 29 Weekly Comp. Pres. Doc. 1418, 1419 (July 22, 1993).
6. *See generally* Federal-State Joint Bd. on Universal Serv., *Report and Order*, 12 FCC Rcd. 8776, 7 Comm. Reg. (P & F) 109 (1997) [hereinafter *Universal Serv. Report and Order*]; Federal-State Bd. on Universal Serv., *Joint Petition for Reconsideration of Comcast Cellular, Inc. & Vanguard Cellular Sys., Inc.* in CC Dkt. No. 96-45 (July 17, 1997) (on file with author); Federal-State Bd. on Universal Serv., *Petition for Reconsideration of Nextel Comm., Inc.* in CC Dkt. No. 96-45 (July 17, 1997) (on file with authors); Petition of Pittencrieff Comm., Inc. for Declaratory Ruling Regarding Preemption of the Tex. Pub. Util. Reg. Act of 1995, *Memorandum Opinion and Order*, 9 Comm. Reg. (P & F) 1041 (1997) [hereinafter *Pittencrieff Order*].
7. This Article addresses regulatory policies applied to *mobile* communications services. The 1993 Budget Act policies do not apply to wireless networks that are fixed, rather than mobile. This artificial distinction would result in a solely fixed network operator being regulated as would a comparable wireline carrier. The Authors believe this result is neither efficient, desirable, nor in the public interest. They suggest that Congress should treat all wireless entities as it treats CMRS providers.
8. For example, in 1994, the FCC created a Wireless Telecommunications Bureau to concentrate the FCC's efforts relating to the industry and acted decisively in rejecting every state commission application to continue to regulate intrastate CMRS services. In addition, in 1995, the Commission issued a *Notice of Proposed Rulemaking* that tentatively concluded that the interconnection policies of local telephone companies posed a significant threat to the development of CMRS as a competing local communications service provider. Interconnection Between Local Exchange Carriers and Commercial Radio Serv. Providers, *Notice of Proposed Rulemaking*, 11 FCC Rcd. 5020, 4 Comm. Reg. (P & F) 2055 (1996).
9. *See* Petitions for Cert., Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).
10. State communications jurisdiction pursuant to section 2(b) would appear to extend to consumer billing and related matters. It does not appear that Congress intended to eliminate state antitrust, contract, or other authority to the extent these claims do not conflict with federal authority or section 253 of the Telecommunications Act of 1996.

Telecommunications Act of 1996, sec. 101(a), § 253, 47 U.S.C.A. § 253 (West Supp. 1997) (authorizing the FCC to preempt local or state laws or regulations that act as a barrier to competition).

11. *See, e.g.*, Illinois Pub. Telecomm. Ass'n. v. FCC, 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g by* 123 F.3d 693 (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). In its Supreme Court brief arguing that Congress did *not* intend to preempt state regulation of payphone rates with section 276 of the 1996 Act, the Virginia State Corporation Commission pointed out that "[h]ad Congress, in enacting § 276, intended to preempt state regulation . . . it would have used the same explicit 'notwithstanding § 2(b)' language that it used in 1990 and 1993 when enacting §§ 225 and 332 . . ." The Court let stand the D.C. Circuit decision upholding FCC jurisdiction, even in the absence of an amendment to §2(b).

12. U.S. Const. art. I, § 8, cl. 3.

13. Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379, *amended in part by* Mann-Elkins Act, ch. 309, § 7, 36 Stat. 539, 544-45 (1910), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 1997)). An understanding of the jurisdictional development of the Interstate Commerce Commission is helpful in understanding the Commission's statutory authority. *See* American Tel. & Tel. Co. v. United Artists Payphone Corp., 852 F. Supp. 221, 222 (S.D.N.Y. 1994) (stating that because "the Communications Act was modelled on the Interstate Commerce Act, decisions construing the latter are persuasive in establishing the meaning of the former").

14. Mann-Elkins Act, Pub. L. No. 218, ch. 309, § 7, 36 Stat. 539, 544 (1910), *repealed by* Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 and Supp. 1997)). The reference to cable companies in the Mann-Elkins Act refers to the offering of telegraph and telephone service via submarine cable systems.

15. *Houston, E. & W. Tex. Ry.*, 234 U.S. 342 (1914).

16. *Id.* at 347.

17. *Id.*

18. The Court stated:

Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.

Id. at 350-51 (quoting *County of Mobile v. Kimball*, 102 U.S. 691, 697 (1880)).

19. *Id.* at 351.

20. *Id.* at 352.

21. *Id.* at 353.

22. *Id.* at 351 (emphasis added).

23. *Id.* at 353 (emphasis added). "Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce." *Id.*

24. *Id.* at 355-56. The Act provided:

That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Id. (quoting Interstate Commerce Act of 1887, ch. 104, § 3, 24 Stat. 379, 380).

25. *Id.* at 356 (quoting S. Rep. No. 49-46, at 215 (1886)).

26. *Id.* (quoting S. Rep. No. 49-46, at 215 (1886)).

27. *Id.* at 360 ("It was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters, and, where the interests of the freedom of interstate commerce are involved, the judgment of Congress and of the agencies it lawfully establishes must control.").

28. *Id.* at 358.

29. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), *enforced by* *Illinois Bell Tel. Co. v. Gilbert*, 3 F. Supp. 595 (N.D. Ill. 1933), *rev'd sub nom.* *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151 (1934).

30. "The separation of the intrastate and interstate property, revenues and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation." *Id.* at 148.

31. *Id.* at 149.

32. Carolyn Whitworth Malanga, Note, *California v. Federal Communications Commission: Continuing the Struggle Between Sections 151 and 152 of the Communications Act*, 40 Cath. U. L. Rev. 893, 904 (1991). President Roosevelt explained that the FCC should have the authority "now lying with the Federal Radio Commission and with such authority over communications as now lies with the Interstate Commerce Commission—the services affected to be all those which rely on wires, cables, or radio as a medium of transmission." President Franklin D. Roosevelt, Message to Congress, S. Doc. No. 73-144 (1934).

33. Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 1997)).

34. Malanga, *supra* note 32, at 905.

35. Section 1 reads:

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064 (codified as amended at 47 U.S.C. 151).

36. Section 2(a) provides: "The provisions of this Act shall apply to all interstate and foreign communication by wire

or radio" *Id.* § 2(a), 48 Stat. at 1064 (codified as amended at 47 U.S.C. 152(a)).

37. As originally enacted, section 2(b) read: "Subject to the provisions of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier" *Id.* § 2(b), 48 Stat. at 1065; *see also* section 2(b) as amended, *infra* note 42.

38. 47 U.S.C. § 151 (1994).

39. In the decade preceding the landmark *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) decision (*see infra* notes 44-47 and accompanying text), courts consistently gave the FCC considerable latitude in executing its regulatory function. *See, e.g.*, *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 792 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027 (1976) (upholding an FCC declaratory ruling asserting federal jurisdiction over connection of nontelephone company provided customer premises equipment (CPE) to public networks by stating that section 2(b) precludes federal intervention only in areas "that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications"); *North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1977), *cert. denied*, 434 U.S. 874 (1977) (holding that the FCC could properly preempt state regulations barring or interfering with CPE use); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978) (upholding FCC regulation of facilities physically located entirely within the territory of a single state where the facilities were simultaneously used for both intrastate and interstate purposes and it was "technically and practically difficult to separate the two types of communications"); *Computer and Comm. Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (affirming FCC preemption of state CPE and enhanced services regulation).

40. *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert. denied sub nom. National Ass'n of Radio Tel. Sys. v. FCC*, 425 U.S. 992 (1976).

41. A carrier "will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal" or where it lacks a "quasi-public character." *NARUC*, 525 F.2d at 641. The 1993 Act classified interconnected SMR operators as common carriers.

42. In 1982 Congress amended section 331 (which later became section 332) to codify the SMR decision:

Sec. 331(c)

(1) For purposes of this section, *private land mobile service shall include service provided by specialized mobile radio . . .*

(2) *A person engaged in private land mobile service shall not, insofar as such person is so engaged, be deemed a common carrier for any purpose under this Act. . . .*

(3) No State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service.

Communications Amendments Act of 1982—National Telecommunications and Information Administration, Pub. L. No. 97-259, § 120(a), 96 Stat. 1087, 1096-97 (emphasis added).

Consequently, under the Commission's regulatory framework and Congress's 1981 amendments wholly "intrastate" communications on SMR networks were subject to federal, not state, regulatory authority. It should be noted as well that the term "rate and entry" was used as a statutory shorthand for common carrier regulation. *Cf. Infra* Part II.C.1. These substantive amendments preempting state authority took effect notwithstanding Congress's failure to amend section 2(b) at the time. We will show conclusively that use of this term in the 1993 amendments does not narrow the scope of Congress's preemption.

In 1992, Congress renumbered the section. "Section 331 of such Act as added by Public Law 97-259 (47 U.S.C. § 332) is redesignated as section 332." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 25(b), 106 Stat. 1502 (1992).

43. Michael J. Zpevak, *FCC Preemption After Louisiana PSC*, 45 Fed. Comm. L.J. 185, 190 (1993). For a comprehensive and well-reasoned analysis of preemption jurisprudence involving the FCC prior to the *Louisiana PSC* decision, see Richard McKenna, *Pre-emption Under the Communications Act*, 37 Fed. Comm. L. J. 1 (1985).

44. *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355 (1986).

45. *Id.* at 374.

46. Following the *Louisiana PSC* decision, the FCC encountered a number of preemption defeats in the courts of appeal. For example, three years after *Louisiana PSC*, the D.C. Circuit also restricted the scope of FCC jurisdiction when it held that FCC preemption of state regulation would be proper "only to the extent that such regulation negates the federal policy of ensuring a competitive market in [the service to be regulated]." *NARUC v. FCC*, 880 F.2d 422, 431 (1989); *see also* *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (reversing three FCC orders), *vacated in part*, 39 F.3d 919, *cert. denied sub nom.* *New York v. FCC*, 514 U.S. 1050 (1995).

47. As the *Louisiana PSC* Court noted:

In deciding these cases, it goes without saying that we do not assess the wisdom of the asserted federal policy of encouraging competition within the telecommunications industry. Nor do we consider whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose. . . . [O]ur task is simply to determine where Congress *has* placed the responsibility

Louisiana PSC, 476 U.S. at 359.

48. *See infra* notes 189-227 and accompanying text. Monopoly telephone carriers, for example, refused to interconnect at reasonable prices, and delayed providing telephone numbers to cellular and paging competitors, among other things.

49. The FCC's first cellular orders of 1981 and 1982 designated two carriers per market, while its 1992 *PCS Order* allowed six carriers per market. *See* *Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Comm. Sys., Report and Order*, 86 F.C.C.2d 469, 49 Rad. Reg. 2d (P & F) 809 (1981) (proceeding terminated), *reconsidered by Memorandum Opinion and Order On Reconsideration*, 89 F.C.C.2d 58, 50 Rad. Reg. 2d (P & F) 1673 (1982) (proceeding terminated); *Amendment of the Comm'n's Rules to Establish New Personal Comm. Servs., Tentative Decision and Memorandum Opinion and Order*, 7 FCC Rcd. 7794, 71 Rad. Reg. 2d (P & F) 683 (1992).

50. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587 (emphasis added).

51. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(b), 107 Stat. 312, 392 (codified in relevant part at 47 U.S.C. § 332 (1994)).

52. Section 332(c) is entitled "Regulatory treatment of mobile services." 47 U.S.C. § 332(c) (1994).

53. H.R. Rep. No. 103-213, at 490 (1993) (emphasis added).

54. 47 U.S.C. § 332(c)(3)(A).

55. *Petition of Pub. Utils. Comm'n, State of Haw., for Authority To Extend Its Rate Reg. of Commercial Mobile Radio Servs. in the State of Haw., Order*, 10 FCC Rcd. 2359, para. 2 (1995).

56. *See, e.g.,* *Petition on Behalf of the La. Pub. Serv. Comm'n for Authority To Retain Existing Jurisdiction over*

Commercial Mobile Radio Servs. Offered Within the State of La., *Report and Order*, 10 FCC Rcd. 7898, Rad. Reg. 2d (P & F) 326 (1995); Petition of the People of the State of Cal. and the Pub. Utils. Comm'n of the State of Cal. To Retain Reg. Authority over Intrastate Cellular Serv. Rates, *Order on Reconsideration*, 11 FCC Rcd. 796, 1 Comm. Reg. (P & F) 1157 (1995); Petition of N.Y. State Pub. Serv. Comm'n To Extend Rate Reg., *Report and Order*, 10 FCC Rcd. 8187, 78 Rad. Reg. (P & F) 251 (1995); *see also* Petition of Ariz. Corp. Comm'n, *Report and Order and Order on Reconsideration*, 10 FCC Rcd. 7824, 78 Rad. Reg. 2d (P & F) 308 (1995); Petition on Behalf of the State of Haw. Pub. Util. Comm'n, for Authority to Extend its Rate Reg. of Commercial Mobile Radio Servs. in the State of Haw., *Report and Order*, 10 FCC Rcd. 7872 (1995); Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Servs., *Report and Order*, 10 FCC Rcd. 3379 (1995).

57. Only those states exercising regulatory authority over CMRS were able to petition the FCC to maintain that authority. 47 U.S.C. § 332(c)(3)(B).

58. *See, e.g.*, Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *Third Order on Reconsideration on Further Notice of Proposed Rulemaking*, 12 FCC Rcd. 12,460, 8 Comm. Reg. (P & F) 1206 (1997); Implementation of Sections 3(n) and 332 of the Comm. Act, *Memorandum Opinion and Order on Partial Reconsideration of Second Report and Order*, 11 FCC Rcd. 19,729, 5 Comm. Reg. (P & F) 1302 (1996).

59. *See, e.g.*, Implementation of Sections 3(n) and 332 of the Comm. Act, *Second Report and Order*, 9 FCC Rcd. 1411, 74 Rad. Reg. 2d (P & F) 835 (1994); Further Forbearance from Title II Reg. for Certain Types of Commercial Mobile Radio Serv. Providers, *Notice of Proposed Rulemaking*, 9 FCC Rcd. 2164 (1994).

60. H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

61. Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, *First Report and Order*, 11 FCC Rcd. 15,499, 16,005, 4 Comm. Reg. (P & F) 1 (1996) [hereinafter *Local Competition First Report and Order*].

62. *Iowa Utils. Bd.*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom.* AT&T v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

63. *See supra* notes 48-62 and accompanying text.

64. The Eighth Circuit held the FCC's exercise of this authority was inappropriate with respect to non-CMRS common carriers. However, the court specifically upheld the FCC's broad scope of authority as applied to the wireless industry. *See supra* note 61 and accompanying text; *Iowa Utils. Bd.*, 120 F.3d at 800. The Authors believe the Eighth Circuit penetrated to the essence of Congress's intent in the 1993 Act. For a number of reasons too complex to address in this Article, fault can be found with the court's analysis of the 1996 Act provisions. *See* Petition for Cert. of the United States, *Iowa Utils. Bd.*, 120 F.3d 753 (8th Cir. 1997) (No. 97-826 et al.).

65. *Local Competition First Report and Order*, 11 FCC Rcd. 15,499, 4 Comm. Reg. (P & F) 1; *see also* Motion To Lift Stay of Airtouch, *Iowa Utils. Bd.*, 120 F.3d 753 (96-3321 et al.); *Iowa Utils. Bd.*, Nos. 96-3321 et al. (8th Cir. Nov. 1, 1996) (Order Lifting Stay in Part) <<http://ls.wustl.edu/8th.cir/FCC/Opinions/FCC?963221.019>>.

66. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir.), *motion to vacate stay denied*, 117 S. Ct. 378 (1996).

67. *See Iowa Utils. Bd.*, 120 F.3d at 800 n.21; *see also Iowa Public Utilities* discussion *infra* notes 138-43 and accompanying text.

68. 47 U.S.C. § 152(b) (1994); *see also supra* Part II.C.1.

69. 47 U.S.C. § 332(c)(3). The Conference Report accompanying the legislation states that the accompanying amendment to section 2(b) was made to "clarify that the Commission has the authority to regulate commercial mobile services." H.R. Conf. Rep. No. 103-213, at 497 (1993), *reprinted in* 1993 U.S.C.C.A.N. 864, 1186.

70. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

71. *Houston E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

72. See *supra* Part II.A for a discussion of the *Shreveport Rate Case* era.

73. 47 U.S.C. § 152(b).

74. See *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986); *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *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).

75. *Louisiana PSC*, 476 U.S. at 372-76 (1986).

76. The Court noted that the main clause of 2(b) is itself a rule of statutory construction that "presents its own specific instructions regarding the correct approach to the statute which applies to how we should read § 220." *Id.* at 376 n.5.

77. 47 U.S.C. § 152(b) (emphasis added).

78. See, e.g., *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041 (1997).

79. 47 U.S.C. § 332(c)(3)(A).

By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (*e.g.* zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

80. Congress defined "universal service" in the 1996 Act as follows:

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—(A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity.

Telecommunications Act of 1996, sec. 101(a), § 254(c), 47 U.S.C.A. § 254(c) (West Supp. 1997).

81. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

82. See *Illinois Pub. Telecomm. Ass'n. v. FCC*, 117 F.3d 555, 564 (D.C. Cir.), *clarified on reh'g* by 123 F.3d 693 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 66 U.S.L.W. 3458 (U.S. Mar. 29, 1997) (No. 97-1072); *Pole Attachments Act*, Pub. L. No. 95-234, 92 Stat. 35 (1978) (amending Communications Act of 1934) (codified as amended at 47 U.S.C. § 224). *But see Universal Serv. Report and Order*, 12 FCC Rcd. 8776, 7 Comm. Reg. (P & F) 109 (1997); *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041 (1997). In both section 276 of the 1996 Act and the Pole Attachment Act, Congress modified the FCC's jurisdiction. This modified jurisdiction was exercised *without* any express amendment to section 2(b) of the Communications Act. In redefining the boundaries of FCC jurisdiction over CMRS providers in section 332, Congress made its intent even more explicit by taking the overt step of expressly changing section 2(b).

83. *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, 7 Comm. Reg. (P & F) 109.

84. *Id.* para. 791.

85. 47 U.S.C.A. § 254(f).

86. *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, para. 791, 7 Comm. Reg. (P & F) 109.

87. The FCC noted that California has required CMRS providers to contribute to the state's programs for Lifeline and high-cost small companies since January 1, 1995. *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, para 791, 7 Comm. Reg. (P & F) 109 (citing Alternative Regulatory Frameworks for Local Exchange Carriers, *Order*, 56 C.P.U.C.2d 117, 290 (Cal. P.U.C. 1994) (No. 94-09-065)).

88. *Illinois Pub. Telecomm. Ass'n. v. FCC*, 117 F.3d 555, 564 (D.C. Cir.), *clarified on reh'g* by 123 F.3d 693 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 66 U.S.L.W. 3458 (U.S. Mar. 29, 1997) (No. 97-1072).

89. A recent report of the International Telecommunications Union (ITU), an United Nations intergovernmental organization, found that cellular telephony is now used as a "substitute" for, rather than a supplement to, fixed line networks in developing countries such as China, South Africa, Thailand, Malayasia, Venezuela, Jamaica, Lebanon, Gabon, Colombia, Sri Lanka, Cambodia, and the Philippines. "Substitution typically occurs where relatively low levels of fixed-line density are combined with competitive mobile cellular markets." International Telecommunication Union, Universal Access Executive Summary, World Telecommunication Development Report 1998, Fig. 3 (Mar. 1998)

<http://www.itu.int/ti/publications/WTDR_98/index.html>; *see also* Frances Cairncross, *A Connected World*, *The Economist*, Sept. 13, 1997, at S3, S19. The ITU found, for example, that 60% of all telephone subscribers in Cambodia now use mobile cellular. Fixed lines account for only 25% of Cambodian telephone service with fixed wireless providing the remainder. *Id.* at 18.

90. General Investigation into Competition Within the Telecomm. Industry in the State of Kan., State Corp. Comm'n of Kan., *Order*, Dkt. No. 190, 492-U 94-GIMT-478-GIT, 36, para. 111 (Kan. Corp. Comm'n Dec. 27, 1996).

91. *See* Mandates of Assembly Bill 3643, *Decision*, No. 96-10-066, *available in* 1996 WL 651546 (Cal. P.U.C. 1996).

92. Federal-State Joint Bd. on Universal Serv., *Fourth Report and Order on Reconsideration*, CC Dkt. No. 96-45, 1997 WL 797523 (Dec. 30, 1997).

93. *See infra* notes 144-57 for a discussion of the *Pittencrieff Order*.

94. As we have discussed earlier, the 1993 amendment to section 2(b) removed any substantive state regulatory authority. Consequently, there are no intrastate CMRS telecommunications for these purposes.

95. In response to this interpretation by the FCC that section 254(f) supersedes section 332(c)(3), several CMRS providers recently filed a joint brief in the upcoming Fifth Circuit Court of Appeals review of *Texas Office of Public Utility Counsel v. FCC*. Joint Brief of Intervenors, *Texas Office of Pub. Util. Counsel v. FCC* (5th Cir. Mar. 9, 1998) (Nos. 97-60421 and consolidated cases) (consolidation of challenges to the *Pittencrieff Order*).

96. As Representative Jack Fields noted after the passage of the 1993 Act and at the early stages of the legislative process for the 1996 Act:

Last year we began the process of building a national telecommunications infrastructure when we adopted a regulatory framework for wireless services built on the same concepts contained in [the 1993 Act]. Today we will take the next step in the process of crafting a national telecommunications policy as we turn our attention to other sectors of the telecommunications industry.

To Supersede the Modification of Final Judgment Entered August 24, 1982, in the Antitrust Action Styled United States v. Western Electric, Civil Action No. 82-0192, United States District Court for the District of Columbia To Amend the Communications Act of 1934 To Regulate the Manufacturing of Bell Operating Companies, and for other Purposes: Hearings on H.R. 3626 Before the Subcomm. on Telecommunications and Finance of the House Comm. On Energy and Commerce, 103d Cong., 117 (1993) (statement of Rep. Fields).

The "regulatory framework for wireless services" to which Rep. Fields refers is the federal one expressly carved out by Congress in the 1993 Act in response to the unique nature of wireless calls and the opportunities presented by a nationally regulated wireless industry. *See Ex parte letter from Airtouch Comm. re: Interconnection Between Local Exchange Carriers and Commercial Radio Service Providers, to William F. Caton, Acting Secretary, FCC, at 10 (March 20, 1996) (on file with authors).*

97. *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).

98. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(c)(1), 110 Stat. 56, 143 (appearing as note (c)(1) to 47 U.S.C.A. § 152 (West Supp. 1997)).

99. Both the Senate and House versions of the 1996 Act presented all sections of the Removal of Barriers to Entry provision as section 254, which included universal service in subsection 254(b). H.R. Conf. Rep. No. 104-458, at 126-27 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 138-39. This section was changed in the House Conference Report to section 253. *Id.* at 127, *reprinted in* 1996 U.S.C.C.A.N. 124, 138-39.

100. 47 U.S.C.A. § 253(e) (West Supp. 1997).

101. *Connecticut Dep't of Pub. Util. Control*, 78 F.3d 842 (2d Cir. 1996).

102. Section 332(c)(3)(A) allows a state to petition the FCC for permission to regulate the rates for CMRS. 47 U.S.C. § 332(c)(3)(A) (1994).

103. *Connecticut Dep't of Pub. Util. Control*, 78 F.3d at 846 (quoting 47 U.S.C. § 332(c)(3)(A)(i),(B)). The court stated that the order listed eight types of "evidence, information, and analysis" as "pertinent to [its] examination of market conditions and consumer protection." *Id.* (quoting Implementation of Sections 3(n) and 332 of the Communications Act, *Second Report and Order*, 9 FCC Rcd. 1411, para. 252, 74 Rad. Reg. 2d (P & F) 835 (1994)) (alteration in original).

104. *Id.* at 850.

105. *Id.* at 845.

106. *Id.* at 846. "While . . . states have a legitimate interest in protecting the interest of telecommunications users in their jurisdictions, . . . competition is a strong protector of these interests and that state regulation in this context could inadvertently become as [sic] a burden to the development of this competition." *Id.* (quoting Implementation of Sections 3(n) and 332 of the Comm. Act, *Second Report and Order*, 9 FCC Rcd. 1411, para. 23, 74 Rad. Reg. 2d (P & F) 835 (1994) (alteration in original)).

107. *Id.* at 850-51.

108. *Metro Mobile CTS, Inc.*, No. CV-95-0051275S, 1996 WL 737480 (Conn. Super. Ct. Dec. 11, 1996).

109. *Id.* at *3 (quoting 47 U.S.C. § 332(c)(3)(A)).

110. *Id.*

111. *Id.* (quoting 47 U.S.C. § 332(c)(3)(A)).

112. *Id.* (emphasis added).

113. *Mountain Solutions, Inc.*, 966 F. Supp. 1043 (D. Kan. 1997), *appeal pending*, Nos. 97-3180 & 97-3186 consolidated, (10th Cir. Appellant Brief filed Sept. 27, 1997).

114. *Id.* at 1047.

115.

The universal service language contained in the second sentence of section 332(c)(3)(A) merely clarifies that states wishing to ensure the universal availability of affordable telecommunications services may regulate the *rates and market entry* of commercial mobile service providers if certain preconditions are satisfied. Nothing in that sentence indicates any intent to prevent states from attempting to guarantee universal availability of telecommunications services through means other than *rate or market entry regulation*.

Id. at 1048. While the court's statement is literally correct, as shown earlier, it ignores the requirement of section 332 and the amendment to section 2(b) that places the substantive responsibility for CMRS regulation squarely on the FCC, not the states.

116. *Id.*

117. *Id.* at 1047.

118. *Id.* at 1049 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993)).

119. *Id.* at 1048. As noted above, the Act's legislative history reveals that a federal regulatory framework for CMRS was in fact precisely the result Congress intended. *See supra* Part II.C.1 and accompanying text.

120. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

121. *GTE Mobilnet*, 111 F.3d 469 (6th Cir. 1997).

122. *Id.* at 472.

123. *Id.* at 473.

124. *Id.*

125. *Younger*, 401 U.S. 37 (1971) (requiring that principles of comity and federalism guide abstention decisions).

126. *Pullman*, 312 U.S. 469 (1941).

127. *GTE Mobilnet*, 111 F.3d at 474.

128. *Id.* at 469.

129. 47 U.S.C. § 332(c)(3)(A)(i) (1994).

130. *CXST*, 883 F.2d 468, 472-74 (6th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990).

131. *GTE Mobilnet*, 111 F.3d at 480.

132. *Id.* at 480. "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbusch v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1724 (1996).

133. *GTE Mobilnet*, 111 F.3d at 481.

134. *Id.* at 482. The third requirement was satisfied because of the ability of a court to review the decision of an administrative agency even though that would be the point at which the constitutional issues were raised.

135. *Id.*

136. 47 U.S.C. § 202 (1994).

137. *See, e.g.*, The Just and Reasonable Nature of, and State Law Challenges to, Rates Charged by CMRS Providers When Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Petition for a Declaratory ruling* of Southwestern Bell Mobile Systems in DA 97-2464 (petition date Nov. 12, 1997) (responding to numerous class actions being filed in state courts against CMRS providers, and seeking a declaratory injunction stating that the rates are governed by federal law and that § 332(c)(3) forbids state jurisdiction).

138. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir.), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998); see also *supra* notes 62-67 and accompanying text for a discussion of the *Iowa Utilities* decision.

139. *Id.* at 800 n.21.

140. *Id.* at 796.

141. *Id.* at 800.

142. *Id.* at 797.

143. *See also* *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 561-62 (D.C. Cir.), *clarified on reh'g by* 123 F.3d 693 (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).

144. *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041 (1997).

145. *Universal Serv. Report and Order*, 12 FCC Rcd. 8776, 7 Comm. Reg. (P & F) 109 (1997).

146. In its Universal Service Fourth Order on Reconsideration, the FCC relies on the reasoning in the *Pittencrieff Order* as justification for subjecting CMRS providers to state universal service requirements. *See* Federal-State Joint Bd. on Universal Serv., *Fourth Report and Order on Reconsideration*, CC Dkt. No. 96-45, 1997 WL 797523 (Dec. 30, 1997). However, as noted above, the *Pittencrieff Order* fails to consider the role of section 2(b) in determining Congress's intent for the scope of FCC jurisdiction over wireless providers.

147. *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041, para. 13.

148. *Id.* para. 24.

149. 47 U.S.C. § 332(c)(3)(A) (1997).

150. *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041, para. 25.

151. *See, e.g.*, *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir.), *clarified on reh'g by* 123 F.3d 693 (D.C. Cir. 1997), *cert. denied sub nom. Virginia State Corp. Comm'n v. FCC*, 66 U.S.L.W. 3458 (U.S. Mar. 29, 1997) (No. 97-1072). The court looked at the entire statute, including § 152(b)'s "statutory construction" provision, before concluding that Congress intended § 276 to endow the FCC with the authority to regulate local coin call rates. *Id.*

152. The Commission determined that "Congress intended [other terms and conditions] to include `such other matters that fall within a state's lawful authority.'" *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041, para. 16 (citing H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* U.S.C.C.A.N. 378, 588).

153. H.R. Rep. No. 111-103, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

154. Once Congress modified section 2(b) to exclude CMRS, the FCC gained exclusive jurisdiction over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service . . ." except as otherwise provided for in section 332. 47 U.S.C. § 152(b)(1).

155. *See Metro Mobile CTS Inc. v. Connecticut Dept. of Pub. Util. Control*, No. CV-95-051275S, 1996 WL 737480, at *8 (Conn. Super. Ct. Dec. 11, 1996).

156. While the Eighth Circuit in *Iowa Utilities* narrowly construed grants of authority to the FCC over purely interstate matters and prohibited the FCC from regulating intrastate matters absent express, unambiguous statutory language, this narrow approach to construction is inapplicable where, as in the case of section 332, Congress has amended section 2(b) to provide expressly such authority to the Commission.

157. As a jurisdictionally interstate service, CMRS should not be subject only to state universal service programs.

158. *See supra* note 98 and accompanying text.

159. *Illinois Pub. Telecomm. Ass'n*, 117 F.3d 555 (D.C. Cir.), *clarified on reh'g by* 123 F.3d 693 (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).

160. *Id.* at 558.

161. *Id.* at 559-60 (citing Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomm. Act of 1996, *Report and Order*, 11 FCC Rcd. 20,541, paras. 48-49, 4 Comm. Reg. (P & F) 938, *reconsidered by Order on Reconsideration*, 11 FCC Rcd. 21,233, 5 Comm. Reg. (P & F) 321 (1996)).

162. *Id.* at 560 (citing Implementation of the Pay Tel. Reclassification and Compensation Provisions of the Telecomm. Act of 1996, *Report and Order*, 11 FCC Rcd. 20,541, para. 51, 4 Comm. Reg. (P & F) 938, *reconsidered by Order on Reconsideration*, 11 FCC Rcd. 21,233, 5 Comm. Reg. (P & F) 321 (1996)).

163. *Id.* at 559. Additionally, the FCC determined that the PSPs were not fairly compensated for access code calls, subscriber 800 and other toll-free calls, and 0+ calls provided by PSPs affiliated with a BOC. *Id.*

164. 47 U.S.C. § 152(b).

165. *Illinois Pub. Telecomm. Ass'n.*, 117 F.3d at 561.

166. *Id.* Specifically, section 276 authorizes the FCC to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone" so as "to promote competition among payphone service providers . . ." Telecommunications Act of 1996, sec. 151(a), § 276(b)(1), 47 U.S.C.A. § 276(b)(1) (West Supp. 1997). For an explanation of the compensation schemes in place prior to the enactment of the 1996 Telecommunications Act, see *Illinois Public Telecommunications Ass'n*, 117 F.3d at 558-59.

167. *Illinois Pub. Telecomm. Ass'n.*, 117 F.3d at 562.

168. *Id.* Additionally, the court concluded that because Congress expressly authorized FCC preemption of state regulation, there was no requirement that the federal regulation be narrowly tailored. *Id.* at 563.

169. *Id.* at 561-62 (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986)) (first alteration in original) (emphasis added).

170. *Virginia State Corp. Comm'n v. FCC*, 66 U.S.L.W. 3458 (U.S. Mar. 30, 1998) (No. 97-1072).

171. *Bell Atl. Tel. Co.*, 131 F.3d 1044 (D.C. Cir. 1997).

172. Specifically, while section 272(a) mandates that a Bell Operating Company could not "provide origination of most communications services between Local Access and Transport Areas ('interLATA services') except through a separate affiliate," section 272(e)(4) provides that a Bell Operating Company "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions" *Id.* at 1045; 47 U.S.C.A. § 272(e)(4) (West Supp. 1997).

173. Specifically, the petitioners were challenging an FCC Order determining the correct interplay to be a denial of operating rights to the BOCs.

174. *Chevron*, 467 U.S. 837 (1984).

175. *Bell Atl. Tel. Co.*, 131 F.3d at 1049.

176. *Id.* at 1047 (quoting *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843 n.9)) These traditional tools include the statute's text, legislative history, structure, and purpose. The court stressed that when undertaking a textual analysis, it is necessary to contextualize each provision. *Id.*

177. *Id.*

178. *Id.* at 1049.

179. *Id.*

180. *Id.* This portion of the analysis was also mandated by the *Chevron* Court which provided that should such delegation be found "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* (quoting *Chevron*, 467 U.S. at 843-44).

181. *Id.*

182. *Id.* at 1049-50. Specifically, the court found that because the legislative history was inconclusive, the Commission's interpretation was not inconsistent. *Id.*

183. *Id.* The court noted that the policy purpose of the statute could have been "preventing the BOCs from entering the interLATA origination market except through affiliates until the sunset of § 272(a)(2)." *Id.* at 1050.

184. *Id.*

185. *SBC Comm. v. FCC*, (D.C. Cir. Mar. 20, 1998) (No. 97-1425). The court reached its conclusion that the FCC had been given exclusive jurisdiction under section 271, even though Congress did not take the "extra step" of amending section 2(b), as it had in enacting section 332(c)(3).

186. *See, e.g., Cel-Tech Comm., Inc. v. Los Angeles Cellular Tel. Co.*, 59 Cal. App. 4th 436, 69 Cal. Rptr. 2d 207 (Cal. Ct. App. 1997) (review granted). In a remarkable example of state judicial disregard for FCC plenary jurisdiction over CMRS, the California Court of Appeal recently upheld the application of a state unfair competition law to cellular providers—almost undoubtedly the exact sort of state regulation of CMRS "rates and entry" prohibited by Congress. Specifically, the case involved a complaint by Cel-Tech, a provider of cellular telephones, alleging that L.A. Cellular had violated several provisions of state competition law by selling cellular telephones below cost in an attempt to boost subscriber levels for its cellular service. *Id.* At the time of the litigation, L.A. Cellular was one of two

companies licensed by the FCC to provide cellular service in the Los Angeles area. *Id.* at 444, 69 Cal. Rptr. 2d at 212. L.A. Cellular maintained that the high price elasticity of cellular phones prevented it from obtaining new subscribers and that selling the phones below cost was the best strategy to obtain new subscribers because subscription contracts often accompanied phone purchases. *Id.* at 244, 69 Cal. Rptr. 2d at 213. Significantly, the California state court only evaluated the companies' conduct under state unfair competition laws without addressing federal telecommunications law or the interplay between § 332 and § 2(b) regarding rates and entry of CMRS providers.

187. *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).

188. *See Holmes, supra* note 1.

189. Telecommunications Act of 1996, sec. 704, § 332(c)(7)(A), 47 U.S.C.A. § 332(c)(7)(A) (West Supp. 1997).

190. H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588.

191. The section 332(c)(7)(B) limitations add a host of procedural requirements and prevent state and local governments from using many of their previous bases for regulation.

192. 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

193. 47 U.S.C.A. § 332(c)(7)(B)(i)(II).

194. 47 U.S.C.A. § 332(c)(7)(B)(iv). The desire to prevent costly and time consuming litigation over these issues is evidenced by the statutory grant of authority permitting a party who has suffered from state and local disregard of these provisions to directly petition the FCC for relief. 47 U.S.C.A. § 332(c)(7)(B)(v). The FCC's Wireless Telecommunications Bureau has ruled that a state law requiring a local utility commission to issue a report on the health risks of RF emissions prior to recommending siting regulations violated § 332 to the extent regulations apply to facilities in compliance with FCC emission standards. William J. Franklin, *Siting Issues: The Latest Word*, *Wireless World*, Feb. 1, 1997, *available in* 1997 WL 8479764.

195. 47 U.S.C.A. § 332(c)(7)(B)(ii).

196. 47 U.S.C.A. § 332(c)(7)(B)(iii).

197. *Id.*

198. 47 U.S.C.A. § 332(c)(7)(B)(v).

199. Don Bishop, Editorial, *Beseching for Antenna Sites, and a New Partner for Private Radio?*, *Mobile Radio Tech.*, Sept. 30, 1997, *available in* 1997 WL 11284332 (reporting a recent Cellular Telecommunications Industry Association (CTIA) report demonstrated that 226 moratoria were in effect as of June 1997).

200. 47 U.S.C.A. § 253(a). Specifically, the CTIA report noted that the 226 moratoria represented an increase of 34% from the number of moratoria that had been in place two months earlier. Bishop, *supra* note 199.

201. *Sprint in Battle in Wash. over Tower Moratorium*, *Warren's Telecomm. Reg. Monitor*, May 20, 1996, *available in* 1996 WL 16298659. For example, when the city of Medina imposed a six month moratorium, Sprint suffered a large monetary loss. *Id.* Such losses are a discouraging factor for any new company contemplating entering the marketplace after having spent potentially up to \$105.2 million for the license. *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036 (W.D. Wash. 1996). When Sprint challenged the moratorium and requested the court to order the City to make a decision on the permit, the court held that the City had acted within its authority and upheld the moratorium which had been enacted five days after the enactment of 1996 Telecommunications Act. *Id.*

202. *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. 1036.

203. *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. 1457, 1466 (N.D. Ala. 1997); *Sprint Spectrum, L.P. v. Town of Farmington*, 1997 WL 631104, at *6 (D. Conn. 1997) (stating that "[d]efendant's reliance on *Sprint Spectrum, L.P. v. Medina* . . . is unpersuasive").

204. *Sprint Spectrum, L.P. v. City of Medina*, 924 F. Supp. at 1037.

205. *Id.* at 1040.

206. The moratorium in *Jefferson County* was enacted fifteen months after the passage of the 1996 Act. *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. at 1466. The moratorium in *Farmington* was enacted sixteen months after the 1996 Act became law. *Sprint Spectrum, L.P. v. Farmington*, 1997 WL 631104, at *6.

207. *Sprint Spectrum, L.P. v. Town of West Seneca*, 659 N.Y.S. 2d 687 (Sup. Ct. Erie County 1997). *BellSouth Mobility v. Gwinnet County*, 944 F. Supp. 923 (N.D. Ga. 1996) (concluding that the denial by the Board of Commissioners had not been supported by substantial evidence). *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. at 1468 (stating that the refusal to act on applications was tantamount to a denial and therefore had to be in writing).

208. *Sprint Spectrum, L.P. v. Farmington*, 1997 WL 631104, at *6 ("[T]he moratorium unreasonably delays consideration of Sprint's implementation requests and effectively prohibits wireless telecommunications services.").

209. *Sprint Spectrum, L.P. v. Jefferson County*, 968 F. Supp. at 1467 ("[E]arlier entrants have benefitted most from the moratoria, in that they have been sheltered from the competitive forces of a free market, while late entrants offering superior technology have been burdened in their attempts . . .").

210. *Id.*

211. *See, e.g., BellSouth Mobility*, 944 F. Supp. at 929 (involving issuance of judicial writ of mandamus to a county commission to grant a permit to a wireless carrier).

212. *Several States Tell FCC Not To Block Taxes on PCS Licenses*, Comm. Today, Sept. 11, 1996. The most egregious example of such an impermissible abuse of taxing powers arose when the Oregon Department of Revenue, viewing the license as tangible personal property, assessed Western PCS approximately \$500,000 in annual taxes for its Portland license. Jeffrey Silva, *Oregon Tax Battle Could Provide Precedent for PCS Providers*, RCR Radio Comm. Rep., Dec. 9, 1996, available in 1996 WL 15830127; *see generally*, Daniel S. Welytok, *Taxing the Wireless Communications Business: An Overview of Issues and Trends*, 7 J. Multistate Tax'n 59 (1997) (providing an overview of the taxation of cellular telephone services).

213. Both the House and Senate provisions versions of the 1993 Act incorporated language that would have prevented state and local governments from imposing personal property or similar *ad valorem* taxes on the value of a PCS license. However, the Conferees agreed to drop the language relating to state and local government tax treatment of parties who have obtained licenses under the Communications Act providing:

It is the intent of the Conferees to clarify that nothing in this Act alters or affects the authority or lack of authority of State and local governments to assess *ad valorem* property, or other taxes on the licensee. The Conferees do not intend for the deletion of the proposed House and Senate language to create any other inference regarding the subject matter of the proposed provisions.

H.R. Conf. Rep. No. 103-213, at 486-87 (1993), reprinted in 1993 U.S.C.C.A.N. 1175, 1175-76.

State taxing authority was reaffirmed with the passage of the 1996 Act. Section 601(c)(2), the state tax savings provision, provides that "[n]otwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act." Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 601(c)(2), 110 Stat. 56,

143 (47 U.S.C.A. § 152 advisory note (West Supp. 1997)).

214. 47 U.S.C. § 332(c)(3)(A) (1994).

215. 47 U.S.C.A. § 253(a) (emphasis added).

216. *Several States Tell FCC Not To Block Taxes on PCS Licenses*, *supra* note 206. The disputed tax in Oregon was based on the 'real market value' of the license, \$40.7 million, even though the company actually had paid only \$34.2 million for the license. *Id.* Western PCS asked the FCC to preempt the Oregon Department of Revenue's valuation of the B-Block license acquired by Western PCS through an FCC auction. *Id.* In response to Western's request, the FCC opened up a comment period. Western PCS I Corp. Petition Requesting Preemption of the Or. Dep't of Revenue's Proposed Tax Assessment, *Public Notice*, 11 FCC Rcd. 8787 (July 30, 1997). In 1997, the wireless industry had lobbied the state legislature to pass a bill prohibiting the assessment of taxes on FCC licenses—an effort that ultimately failed when Oregon's governor vetoed the bill. Telephone Interview with Marilyn Harbur, Assistant Attorney General to the Oregon Department of Justice (Mar. 26, 1998). Wary of a renewed industry lobbying effort in 1999 and possible future litigation costs, Oregon state officials recently entered into a settlement with Western PCS that included a compromise on value very favorable to Western. *Id.* The Oregon Department of Revenue also recently settled a similar dispute with Sprint Spectrum under comparable terms. *Id.*

217. Silva, *supra* note 212. In Oregon, for example, the Department of Revenue taxes new entrants but not incumbent cellular services providers.

218. In Oregon, the tax assessment disadvantages and discourages those who bought licenses in secondary markets or at auction. *Id.*

219. *CTIA Wants NPRM on State, Local Tax Preemption*, *Telecomm. Rep.*, Sept. 30, 1996, available in 1996 WL 15880560 (quoting CTIA) (alteration in original).

220. See generally Robert L. Bland, *Franchise Fees and Telecommunications Services: Is a New Paradigm Needed?*, *State Tax Today*, Feb. 11, 1997 (providing more information on the subject of franchise fees).

221. For example, one city has attempted to require wireless carriers to offer discounted communications services, pay franchise fees on gross income, and provide other communications facilities as the price of obtaining franchise agreements for the city. Franklin, *supra* note 194; *WTB Responds to CTIA's Request for Rule Clarification on State, Local Authority*, *Mobile Phone News*, Jan. 20, 1997, available in 1997 WL 7937574. Others have required CMRS providers to obtain city franchises and pay a "gross revenue fee" for rights to operate, give the city rights to buy property at end of the franchise term, and solicit municipal approval of license transfer. *Allied and Competing Technologies*, *Mobile Satellite Rep.*, Nov. 20, 1995, available in 1995 WL 10666499.

222. Telecommunications Act of 1996, sec. 101(a), § 253(c), 47 U.S.C.A. § 253(c) (West Supp. 1997).

223. *Minn. Town Fees for Cellular Antennas and Service Attacked by Industry*, *Comm. Daily*, Nov. 13, 1995, at 4.

224. 47 U.S.C.A. § 253(c).

225. 47 U.S.C.A. § 253(a).

226. Franklin, *supra* note 194. For example, a local Florida proposal involved a charge of \$40,000 per year for authority to construct and maintain a 200-foot tower, plus 25% of the value of each antenna lease, on an annual basis. *Id.* Another locality attempted to use its authority to charge annual fees on construction permits for wireless facilities and modifications of existing structures. *WTB Responds to CTIA's Request for Rule Clarification on State, Local Authority*, *supra* note 221.

227. Franklin, *supra* note 194; *WTB Responds to CTIA's Request for Rule Clarification on State, Local Authority*, *supra* note 221.

228. *See, e.g.*, Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986); *Pittencrieff Order*, 9 Comm. Reg. (P & F) 1041 (1997).

229. The Communications Act of 1934, ch. 652, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.A. (West 1991 & Supp. 1997)).

230. *Louisiana PSC*, 476 U.S. at 374. "First, an agency literally has no power to act . . . unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *Id.*

231. "Creating the telecommunications supermarket may mean abandoning some old practices—practices that no longer fit the revolution that is upon us." William Kennard, FCC Chairman, Remarks to Practising Law Institute, Dec. 11, 1997, at 14, *available in* 1997 FCC Lexis 6940.

232. *See supra* notes 29-31 and accompanying text.

233. Jurisdictional Separations Reform and Referral to the Federal-State Joint Bd., *Notice of Proposed Rulemaking*, 12 FCC Rcd. 22,120 (1997).

234. FCC Asks How To Change Jurisdictional Separations in Competitive Environment, *Telecomm. Reports*, Oct. 13, 1997, at 35, *available in* 1997 WL 7758901 (quoting Jurisdictional Separations Reform and Referral to the Fed.-State Joint Bd., *Notice of Proposed Rulemaking*, 12 FCC Rcd. 22,120, para 333).

235. *Telephony*, *Comm. Daily*, Nov. 14, 1997, at 3 (citing report by Strategis Group).

236. *See* Agreement on Telecommunications Services, Feb. 15, 1997, 36 I.L.M. 354 (1997) (Fourth Protocol to General Agreement on Trade in Services (GATS)).