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California v. Federal Communications Commission: Continuing the Struggle Between Sections 151 and 152 of the Communications Act

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NOTES

CALIFORNIA v. FEDERAL COMMUNICATIONS COMMISSION: CONTINUING THE STRUGGLE BETWEEN SECTIONS 151 AND 152 OF THE COMMUNICATIONS ACT

Section 151 of the Communications Act of 1934, as amended (the Act),¹ mandates that the Federal Communications Commission (FCC or Commission) create a rapid and efficient nationwide telecommunication network. To facilitate creation of this network, section 151 grants the Commission broad jurisdiction over interstate communications. Section 152(b) of the Act,² however, prohibits the Commission from exercising its jurisdiction with respect to intrastate telecommunication matters.³ State regulators, in an attempt to maintain exclusive regulatory control over intrastate telecommunication networks and services, argue that section 152(b) effectively bans all FCC regulation of intrastate communication matters. The states' position has forced state public utility commissions (PUCs) and the FCC into a jurisdictional battle over what the FCC can and cannot regulate. This jurisdictional battle, in addition to delaying implementation of a fully unified nationwide telecommunication infrastructure and preventing consumers' access to all that communications technology can offer, has resulted in conflicting interpretations among the federal courts of appeals regarding the scope of the FCC's jurisdiction under the Communications Act. Courts have di-

1. 47 U.S.C. §§ 151-301 (1988). Section 151 provides: "For the purposes of regulating interstate and foreign commerce in communication . . . so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . there is created a Commission to be known as the 'Federal Communications Commission.'" 47 U.S.C. § 151 (1988).

2. Section 152(b) of the Communications Act provides: "[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classification, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . ." 47 U.S.C. § 152(b) (1988).

3. *Id.*

vided on the question of whether the FCC, despite section 152(b), can preempt state regulation of "enhanced services" pursuant to section 151.⁴

A series of decisions first issued by the Commission in reaction to phone companies providing data processing services over their phone lines precipitated this split in the circuits.⁵ By the late 1960s, computers had grown so sophisticated and useful that telecommunications common carriers began using them to manage customer billing, accounting, marketing, and complex switching and routing functions.⁶ Not surprisingly, the immense computers used to switch and route calls during peak traffic periods provided the phone companies with excess data processing capacity during off-peak hours.⁷ In fact, the phone companies found it economically rewarding to purposefully procure this surplus computer capacity and market it along with basic phone service.⁸

When phone companies began increasing their data processing offerings⁹ the FCC became alarmed, fearing the companies would stifle competition in the burgeoning data processing services industry and reduce the quality of

4. The Commission defines "enhanced services" as those services "offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702 (1990). Services like Westlaw, LEXIS, and NEXIS are examples of "enhanced services."

5. Comment, *Interdependence of Communications and Data Processing: An Alternative Proposal for the Second Computer Inquiry*, 73 NW. U.L. REV. 307, 308 (1978); see also *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 726 (2nd Cir. 1973); Richard McKenna, *Preemption Under the Communications Act*, 37 FED. COMM. L.J. 1, 2-3 (1986); Eli M. Noam, *Federal and State Roles in Telecommunications: The Effects of Deregulation*, 36 VAND. L. REV. 949, 950 (1983); Marilyn R. Stahl Note, *Affordable Rates: The Case Against FCC Preemption of Telephone Depreciation*, 35 AM. U.L. REV. 517, 518 (1986).

6. See Comment, *supra* note 5, at 308.

7. *Id.* at 309; Noam, *supra* note 5, at 959.

8. Comment, *supra* note 5, at 307. The resale of excess computer capacity generated over one half billion dollars in revenue for the phone companies during 1967. *Id.* (citing STANDARD AND POOR'S INDUSTRY SURVEY, 0-13 (1977)).

9. The Commission stated:

[T]he issues which raised basic concern in both the communications and computer industries are those which relate to the nature and extent of the regulatory jurisdiction and control which we intend to exercise over the furnishing of data processing and communications services . . . and the furnishing of data processing services by communications common carriers.

Tentative Decision, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 291, 292 (1970) [hereinafter *Computer I Tentative Decision*]; Final Decision and Order, 28 F.C.C.2d 267 (1971) [hereinafter *Computer I Final Decision*], *aff'd in part and rev'd in part sub nom.* *GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2nd Cir. 1973).

basic service.¹⁰ Specifically, the Commission believed the phone companies would subsidize their data processing activities with revenues from their basic service offerings, enabling them to offer data processing services at prices far below those of any competitor. In 1966, the FCC began investigating the regulatory and policy problems created when common carriers provided data processing services.¹¹ From a regulatory perspective, the interrelated computer and communication technologies made it nearly impossible for the Commission to determine which common carrier provided services¹² were subject to its regulation and which services were purely data processing services and consequently beyond its jurisdiction.¹³ From a policy perspective, the FCC had to reconcile its desire to respond to market forces and develop a competitive enhanced services market with its obligation, under section 151, to ensure that the quality of basic telephone service did not decline as a result of phone company entry into the data processing market.¹⁴ Faced

10. See *Computer I Final Decision*, *supra* note 9, at 270. The FCC feared that common carriers “engag[ed] in remote access data processing will be providing the communications component of the service to themselves, as well as to their computer service competitors in the same business. Here it is feared that carriers may favor their own interests and discriminate against their competitors” *Computer I Tentative Decision*, *supra* note 9, at 299; see *infra* note 20 and accompanying text.

11. The FCC indicated it wanted to address two basic policy and regulatory questions: “(a) The nature and extent of the [FCC’s] regulatory jurisdiction to be applied to data processing services; and (b) Whether, under what circumstances, and subject to what conditions or safeguards, common carriers should be permitted to engage in data processing.” *Computer I Tentative Decision*, *supra* note 9, at 295.

12. Comment, *supra* note 5, at 314 n.33. Data processing consists of

(1) input—the translation of information from human language into a language the system can understand and entry of the information into the system; (2) processing—the performance of logical operations and calculations on the information; (3) storage—the commitment of the information to the system’s information repository; (4) output — the translation of information from machine to human language and return of the information from the system; and (5) control—the control of the time and order in which different parts of the system and the devices which contain those parts perform the first four functions.

Id. (citing Brief for Petitioners at 7-8, *IBM Corp. v. FCC*, 570 F.2d 452 (2d Cir. 1978)).

13. Robert M. Frieden, *The Computer Inquiries: Mapping the Communications/Information Processing Terrain*, 33 *FED. COMM. L.J.* 55 (1981); see *infra* note 21 and accompanying text.

14. Frieden, *supra* note 13, at 56. In its *Computer I Final Decision*, the FCC concluded that

[T]here is a close and intimate relationship between data processing and communications services. . . . [W]ithout appropriate regulatory safeguards, the provision of data processing services by common carriers could adversely affect the statutory obligation of such carriers to provide adequate communication services . . . and impair effective competition in the sale of data processing services.

Supra note 9, at 269.

with these regulatory and policy dilemmas, the FCC commenced a series of rulemaking proceedings.

In *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities (Computer I)*,¹⁵ the first rulemaking specifically addressing common carrier provision of enhanced services, the Commission distinguished regulated and unregulated communication services on the basis of the function or functions the computer performed.¹⁶ For example, if the computer simply transmitted unaltered messages between two or more points using communication facilities,¹⁷ the Commission deemed the service a communication service subject to federal regulation.¹⁸ If the computer processed the information, such as storing or retrieving data "according to programmed instructions,"¹⁹ the FCC deemed the service a non-regulated data processing service, even though communication lines delivered the processing results.²⁰ To prevent anti-competitive cross-subsidization, the Commission also developed structural separation requirements which forced the phone companies to offer their enhanced services through a separate corporate subsidiary.²¹

The United States Court of Appeals for the Second Circuit, in *GTE Service Corp. v. FCC*,²² upheld the *Computer I* orders. The court held that the FCC possessed the authority to regulate common carrier provision of enhanced services pursuant to section 151 of the Act.²³ The court stated that even absent explicit reference to computer services in the Act, the expansive power of the Commission included the jurisdictional authority to regulate common carrier activities in an area as intimately related to communications

15. Notice of Inquiry, 7 F.C.C.2d 11 (1966); Supplemental Notice of Inquiry, 7 F.C.C.2d 19 (1967); Report and Further Notice of Inquiry, 17 F.C.C.2d 587 (1969); Tentative Decision, 28 F.C.C.2d 291 (1970); Final Decision and Order, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973).

16. Computer I Final Decision, *supra* note 9, at 287.

17. *Id.*

18. *Id.*; see Frieden, *supra* note 13, at 65; Comment, *supra* note 5, at 311.

19. Computer I Final Decision, *supra* note 9, at 287.

20. *Id.*

21. The Commission reasoned that forcing common carriers to market and sell enhanced services separately from basic services would ensure

a) that such [provision of enhanced] services [would] not adversely affect the provision of efficient and economic common carrier services; b) that the costs related to the furnishing of such services [would] not be passed on, directly or indirectly, to the users of common carrier services; c) that revenues derived from common carrier services [would] not be used to subsidize any data processing services; and d) that the furnishing of such services [would] not inhibit free and fair competition between communications common carriers and data processing companies

Computer I Tentative Decision, *supra* note 9, at 302.

22. 474 F.2d 724 (2d Cir. 1973).

23. *Id.* at 730-31; see *supra* note 1.

as that of computerized data processing services, especially where provision of these services could affect provision of reasonably priced basic communication services.²⁴

By the late 1970s, developments in communication technology made it increasingly difficult for the FCC, using *Computer I*'s definitions, to determine whether a service was a communication service or a data processing service.²⁵ Consequently, in 1980, the Commission commenced its *Second Computer Inquiry (Computer II)*.²⁶

In *Computer II*, the Commission simplified *Computer I*'s distinctions between regulated and non-regulated services by dividing all information processing and telecommunication services into two categories: "basic transmission services"²⁷ and "enhanced services."²⁸ The FCC concluded

24. 474 F.2d at 730.

25. McKenna, *supra* note 5, at 66 (quoting *Computer I* Tentative Decision, *supra* note 9, at 304).

26. Notice of Inquiry and Proposed Rulemaking, Amendment of Section 64.702 of the Commission's Rules and Regulations, 61 F.C.C.2d 103 (1976) [hereinafter *Computer II* Notice of Inquiry]; Supplemental Notice of Inquiry and Enlargement of Proposed Rulemaking, Amendment of Section 64.702 of the Commission's Rules and Regulations (Supplemental Notice), 64 F.C.C.2d 771 (1977); Tentative Decision and Further Notice of Inquiry and Rulemaking, Amendment of Section 64.702 of the Commission's Rules and Regulations (Tentative Decision), 72 F.C.C.2d 358 (1979); Final Decision, 77 F.C.C.2d 384 (1980) [hereinafter *Computer II* Final Decision], *modified on reconsideration*, Memorandum Opinion and Order, 84 F.C.C.2d 50 (1980), *further reconsideration*, Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512 (1981) [hereinafter *Computer II* Further Reconsideration Order], *aff'd sub nom.* *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

27. *Computer II* Final Decision, *supra* note 26, at 387.

28. *Id.* In *Computer II*, the FCC concluded that, as opposed to basic voice and transmission service, enhanced services were not the kind of "general public offerings" defined as common carriage in *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) (NARUC I). The FCC reasoned that inherent in providing an enhanced service is the ability and practice of vendors to tailor their service to meet the customer's particularized need. *Computer II* Final Decision, *supra* note 26, at 389. The FCC felt that this characteristic of enhanced services distinguished them from basic services.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court held that the FCC could assert jurisdiction over activities which were not within the reach of Title II regulation but were "reasonably ancillary to the effective performance of the Commission's various responsibilities." *Id.* at 178; *see also supra* note 5.

that because enhanced services were not common carrier offerings,²⁹ they were exempt from common carrier regulation.³⁰

PUCs around the country challenged *Computer II*, arguing that the Commission's deregulation had impermissibly preempted state regulation.³¹ Specifically, the PUCs contended that section 152(b) of the Act reserved authority to regulate intrastate communication matters to the states, and that by restricting the states to enacting only those regulations entirely consistent with *Computer II*, the Commission invaded the states' sphere of authority.³² The United States Court of Appeals for the District of Columbia Circuit, in *Computer & Communications Industry Ass'n v. FCC (CCIA)*,³³ read section 151 of the Act expansively and decided that the Commission had correctly exercised its regulatory authority pursuant to section 151 of the Act and had not, as the states contended, invaded the states' sphere of

29. *Computer II* Final Decision, *supra* note 26, at 428-29. Section 153(h) of the Communications Act defines "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communications by wire or radio." 47 U.S.C. § 153(h) (1988). The Act's language does not shed much light on the definition or status of a common carrier, but the Court of Appeals for the District of Columbia Circuit, in *National Ass'n of Regulatory Utility Commissioners v. FCC (NARUC I)*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976), held that a common carrier is something that holds itself out indiscriminately to the public for hire and transmits information exactly as it is given to it by the client. *Id.* at 640-42. The court distinguished a common carrier from an entity that "make[s] individualized decisions, in particular cases, whether and on what terms to deal." *Id.* at 641; *see* *Wold Communications, Inc. v. FCC*, 735 F.2d 1465, 1471 n.10 (D.C. Cir. 1984) (pointing to this distinction as central to the concept of a "common carrier"). Shortly after *NARUC I*, the FCC adopted the court's definition of common carrier as determinative of common carrier status under the Communications Act. *See* Report and Order, *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, 308 (1976). For additional information on the development of the concept of common carrier, see M. HALE, *THE ANALYSIS OF LAW* (1713) (scholars attribute Lord Hale with articulating the concept of a private right affected by a public interest). *See also* Phil Nichols, Note, *Redefining Common Carrier: The FCC's Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501.

30. Although the Commission opened the enhanced services market to competition, *Computer II* retained *Computer I*'s structural separation requirements. *See also infra* text accompanying notes 189-93.

31. *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). State regulators had four arguments. First, they contended that the Commission had mistakenly concluded that it could forbear from regulating CPE and enhanced services. Second, they argued that the Commission, while deregulating the provision of enhanced services, had erroneously preempted inconsistent state regulation. Third, they alleged that the "maximum separation" requirement should have been imposed on other carriers besides AT&T. Finally, the parties argued that the Commission had based its maximum separation decision on a misinterpretation of the 1956 Consent Decree. *Id.* at 206.

32. *Id.* at 209.

33. 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

authority.³⁴ The court thereupon upheld the FCC's preemption of all inconsistent state regulation of enhanced services.³⁵

In 1986, after concluding that evolving competition in the enhanced services market had rendered its *Computer I* and *Computer II* separate corporate subsidiary requirements obsolete,³⁶ the Commission commenced its *Third Computer Inquiry (Computer III)*.³⁷ In *Computer III*, the FCC retained *Computer I*'s definition as well as its deregulation of enhanced services, thereby maintaining FCC preemption of any inconsistent state regulation.³⁸ The FCC went a step further than it had in *Computer II*, however, and eliminated the structural separation requirements for the Bell Operating Companies (BOCs), permitting them to offer enhanced services on an integrated basis.³⁹ State PUCs challenged *Computer III*,⁴⁰ contending, just as

34. *Id.* at 214-18.

35. *Id.*

36. The enhanced services market is increasing by 20 percent per year. See Petition for Declaratory Ruling That States and the District of Columbia Are Preempted From Imposing Entry and Exit Regulation and Tariff Requirements on Carrier Affiliated and Noncarrier Affiliated Enhanced Service Providers 3 (FCC filed Feb 1, 1991) (later withdrawn).

37. Notice of Proposed Rulemaking, Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 50 Fed. Reg. 33,581 (1985); Report and Order, 104 F.C.C.2d 958 (1986) [hereinafter *Computer III Phase I Order*], *modified on reconsideration*, Memorandum Opinion and Order on Reconsideration, 2 F.C.C.R. 3035 (1987) [hereinafter *Computer III Phase I Reconsideration Order*], *further reconsideration*, Memorandum Opinion and Order on Further Reconsideration, 3 F.C.C.R. 1135 (1988), *second further reconsideration*, Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration, 4 F.C.C.R. 5927 (1989), Phase I Order and Phase I Reconsideration Order, *vacated sub nom.* California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Report and Order, 2 F.C.C.R. 3072 (1987) [hereinafter *Computer III Phase II Order*], *reconsideration*, Memorandum Opinion and Order on Reconsideration, 3 F.C.C.R. 1150 (1988), *further reconsideration*, Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration, 4 F.C.C.R. 5927 (1989); see *infra* notes 187-91 and accompanying text.

38. *Computer III Phase I Order*, *supra* note 37, at 1127-28. *Computer III* actually consists of six orders. See *supra* note 37.

39. See *Computer III Phase I Order*, *supra* note 37, at 1126-28; *Computer III Phase I Reconsideration Order*, *supra* note 37, at 3061-63; *Computer III Phase II Order*, *supra* note 37, at 3100-02. In particular, *Computer III* precluded states from "(1) tariffing enhanced services sold by communications carriers; (2) requiring communications carriers to maintain structural separation between their basic and enhanced service operations; and (3) requiring nonstructural safeguards that are inconsistent with or more stringent than the FCC's structural safeguards." California v. FCC, 905 F.2d 1217, 1239 (9th Cir. 1990).

Pursuant to *Computer III*, AT&T and the BOCs could offer enhanced and basic services on an integrated basis after implementing *Computer III*'s non-structural safeguards—comparably efficient interconnection (CEI) and open network architecture (ONA). See *Computer III Phase I Order*, *supra* note 37, at 960.

40. 905 F.2d at 1239.

they had in *CCIA*, that FCC preemption of state regulation of enhanced services violated section 152(b) of the Act.⁴¹

In *California v. FCC*,⁴² the United States Court of Appeals for the Ninth Circuit vacated and remanded the *Computer III* Order maintaining *Computer IP*'s deregulation of enhanced services.⁴³ The court evaluated the meaning and scope of section 152(b),⁴⁴ stating that section 152(b) did not distinguish between regulated and unregulated communications services based on the nature of the services, but rather between providers of the services.⁴⁵ The court thereupon concluded that states could regulate enhanced services.⁴⁶ After acknowledging that the Supreme Court had created an "impossibility exception" to section 152(b)'s ban on FCC control of intrastate communication matters,⁴⁷ the court decided that the *Computer III* Orders did not qualify under the exception because they were not narrowly tailored to preempt only those state regulations which would necessarily thwart and impede valid FCC goals.⁴⁸ The court thereupon invalidated the FCC's preemption of state regulation of enhanced services.⁴⁹

41. *Id.* State PUCs also argued that allowing the BOCs to integrate their regulated and non-regulated activities was an arbitrary and capricious decision in violation of section 10(e) of the Administrative Procedure Act. *Id.* at 1230.

42. 905 F.2d 1217 (9th Cir. 1990).

43. *Id.* at 1246. The *Computer III* decisions before the court were the *Phase I Order*, *Phase I Reconsideration Order*, and *Phase II Order*. 905 F.2d at 1223 n.1.

The court devotes the first part of its opinion to discussing the arbitrary and capricious claim. As background, fourteen months before issuing the *Computer III Phase I Order* allowing the BOCs to offer enhanced services on an integrated basis, the FCC mandated structural separation for the BOCs. Notice of Proposed Rulemaking, Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 93 F.C.C.2d 722 (1983); Report and Order, 95 F.C.C.2d 1117 (1983) [hereinafter *BOC Separation Order*], *aff'd sub nom.* Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984).

In the *BOC Separation Order*, the FCC stressed that the BOCs exercised the same monopoly power through their ownership of the local exchanges that AT&T exercised and, therefore, the BOCs could not offer enhanced services on an integrated basis. 95 F.C.C.2d at 1138-39. The FCC noted that structural separation was necessary to protect the integrity of the two markets: the unregulated market for enhanced services and the regulated market for basic telephone services. *Id.* at 1132-37. Because structural separation would effectively preclude the BOC's from cross-subsidizing their own enhanced services and discriminating against the enhanced service offerings of their competitors, the Commission believed structural separations would ensure that free and fair competition would flourish in the budding enhanced services industry. *Id.*

44. 905 F.2d at 1239.

45. *Id.* at 1239-40.

46. *Id.* at 1242.

47. *Id.* at 1240.

48. *Id.* at 1243-44.

49. *Id.* at 1245.

This Note focuses on the scope of the Commission's section 151 jurisdiction as decided in *California v. FCC*. This Note begins by analyzing the scope of federal and state jurisdiction over telecommunications, both prior to and following the passage of the Communications Act. It next analyzes the development and application of a two-prong preemption test with which courts have upheld FCC preemption for two decades. It then analyzes the preemption test articulated in *California v. FCC*, focusing on the Ninth Circuit's requirement that the Commission meet a higher standard of proof than even the Supreme Court requires. Finally, this Note discusses the impact which *California v. FCC*'s more demanding preemption test is having and will have on the Commission's pro-competitive telecommunication policy. This Note concludes by asserting that the Ninth Circuit's preemption test, by placing a greater evidentiary burden on the Commission when it tries to preempt state telecommunication regulation, severely constrains the Commission in its attempt to fulfill section 151's congressional mandate to create a rapid and efficient nationwide telecommunication network. Thus, this decision appears to set the stage for an endless jurisdictional war between the states and the FCC, a war whose casualties will be the American phone customer who may simply have to do without the most advanced telecommunications services and technology.

I. HISTORIC DIVISION OF TELECOMMUNICATIONS REGULATORY AUTHORITY

A. Pre-1934: Regulation by Default

Prior to 1934,⁵⁰ state public utility commissions regulated intrastate telephone networks and services with little or no interference from the federal government,⁵¹ and the Bell system, primary owner and operator of the interstate telephone network, actually opposed federal government regulation.⁵²

50. The independent telephone industry was born in 1893 when the Bell System patents for the telephone handset expired. Richard Gabel, *The Early Competitive Era in Telephone Communication, 1893-1920*, 34 LAW & CONTEMP. PROBS. 340, 341 (1969). The independents focused on connecting the rural areas, which until then had been areas ignored by the Bell System. *Id.* at 344. In fact, it was only after the Bell patents expired that service reached rural areas for the first time. *Id.* at 345.

51. Stahl, Note, *supra* note 5, at 520-21; Noam, *supra* note 5, at 954.

52. G. Hamilton Loeb, *The Communication Act Policy Toward Competition: A Failure to Communicate*, 1978 DUKE L.J. 1, 6. When the Bell patents expired in 1893-94, small independent companies used the telephone technology to compete with the Bell system. *Id.* at 5. Although AT&T began acquiring these competitive local phone companies, competition remained stiff and largely unchecked by federal control. *Id.* at 6. See Dean Birch, *Common Carrier Communication by Wire and Radio: A Retrospective*, 37 FED. COMM. L.J. 85, 86-87 (1985) (noting that only the Kingsbury Commitment stopped AT&T acquisition of the independents). But see Gabel, *supra* note 50, at 355. Prior to 1934, the federal courts indirectly

The Bell system's attitude changed, however, when the small, and independent phone companies began connecting across state lines and threatening its market-share, forcing the Bell system to lower its prices.⁵³ In an attempt to protect their investment, bankers and other businessmen investing in the Bell system appealed for federal assistance in stabilizing and normalizing these competitive forces.⁵⁴ When the local networks began crossing state lines, and interconnecting with the Bell system's interstate network,⁵⁵ the purely intrastate character of communication facilities began to disappear,⁵⁶ placing the interstate portion of the network within the sphere of federal regulatory power.⁵⁷

regulated the burgeoning phone system by utilizing the Fourteenth Amendment as a means of authority to guide rate-setting bodies. *Id.*

53. Gabel, *supra* note 50, at 355.

54. *Id.* The Morgan banking group, which supported the Bell system financially, wanted the "stability and rationality of operations" that a purely competitive system could not guarantee.

55. Bruce N. Graham, Note, *Administrative Agencies - Separating the Jurisdictional Authorities of State and Federal Administrators in the Regulation of the Physical Equipment Within the Nation's Telephone Network*, North Carolina Utilities Comm'n v. Federal Communications Comm'n, 537 F.2d 787, cert. denied, 97 S. Ct. 651 (1976), 8 U. Tol. L. Rev. 733, 736-37 (1977).

56. *Id.* In the late 1880s, state regulators facilitated the development of a national telephone network by awarding easements across state lands and "awarding exclusive service franchises to companies that agreed to serve local communities." *Id.* at 735 (footnote omitted). Companies like AT&T then sold these franchises to local investors who, in turn, erected the local network and operated the switching facilities. *Id.* at 735 n.10. AT&T subjected the franchises to various conditions, such as requiring that only AT&T-made equipment be used within the networks. *Id.*

State public utility commissions exercised jurisdiction over those burgeoning phone companies operating within their state. *Id.* at 735-36. The states justified their regulation as a valid exercise of their police powers to guarantee "that perceived benefits of the telephone could be enjoyed by the general public." *Id.* (footnote omitted). The Supreme Court approved state regulation of the telephone companies in *Home Telephone & Telegraph Co. v. Los Angeles*, 211 U.S. 265 (1908). Graham, Note, *supra* note 55, at 736 n.12. It was under this control and assistance of the state commissions that local telephone companies were able to flourish and create the infrastructure of an interstate network. *Id.* As an example of this new infrastructure, in 1880, Boston and Providence Rhode Island were connected; Boston and New York were connected in 1884; New York and San Francisco were connected in 1915. *Id.* at 736 n.13.

57. See Graham, Note, *supra* note 55, at 737. It appears that even though the once local networks were developing interstate characteristics, few regulators or courts stressed that the interstate portions of these networks and facilities were subject to federal control. The courts seemed only concerned with the antitrust, tax and corporate matters of AT&T, leaving questions about the regulatory status of the actual facilities to the states. *Id.* at 737 n.14. For example, in 1913, the Justice Department and AT&T entered into an agreement known as the Kingsbury Commitment wherein AT&T, in an effort to avoid being the subject of a DOJ antitrust suit, agreed to divest Western Union (which it had acquired in 1909), interconnect independent lines with its long distance lines and stop buying and acquiring control of in-

In 1910, the federal government brought the communications industry, such as it was, under federal regulatory supervision by passing the Mann-Elkins Act.⁵⁸ The Mann-Elkins Act, an amendment to the Interstate Commerce Act of 1887, vested the Interstate Commerce Commission (ICC) with broad jurisdiction over interstate rates charged by "telegraph, telephone and cable companies."⁵⁹ Whether and to what extent the ICC had jurisdiction over intrastate rates remained unclear until a 1914 Supreme Court decision prompted state regulators to demand that Congress enact legislation expressly limiting the ICC's authority to regulating only the interstate portion of the network.⁶⁰

In *Houston, East and West Railway Co. v. United States*,⁶¹ commonly referred to as the *Shreveport Rate Case*, the Supreme Court upheld the ICC's authority to set intrastate railroad shipping rates when those rates were "injurious affecting, through an unreasonable discrimination, traffic that was interstate."⁶² By upholding the ICC's authority to regulate what appeared to be a primarily intrastate matter,⁶³ the *Shreveport* decision alarmed state telephone regulators.⁶⁴ State regulators saw their authority over the rail-

dependent phone companies "operating in the same market as Bell system subsidiaries." Loeb, *supra* note 52, at 6.

58. Commerce Act (Mann-Elkins) Act, Pub. L. No. 218, ch. 309, § 7, 36 Stat. 544 (1910) (amending Interstate Commerce Act of 1887, ch 104, § 1, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.)).

59. Mann-Elkins Act, Pub. L. No. 218, ch. 309, § 7, 36 Stat. 544. The primary purpose of the amendment, however, seems to have been to expand the ICC's control over the railroads. Commentators note that reference to telecommunications matters was made in a somewhat off-hand manner. See Loeb, *supra* note 52, at 6.

60. Even after acquiring control over interstate phone rates, the ICC still concentrated most of its attention on regulating the railroads. Graham, Note, *supra* note 55 at 738. Once the ICC began focusing its attention on the interstate phone network, however, it began deciding cases based on an ever-broadening interpretation of its authority under the Mann-Elkins Act. See, e.g., *Private Wire Contracts*, 50 I.C.C. 731, 757 (1918) (deciding private telephone lines were part of the interstate telephone network); *Huntington Eng'g Co. v. Chesapeake & Potomac Tel. Co.*, 112 I.C.C. 377, 379 (1926) (asserting that security deposits for telephone service were part of interstate commerce and were therefore subject to ICC regulation).

61. 234 U.S. 342 (1914).

62. *Id.* at 358. The Texas Railroad Commission had established a system of setting intrastate rates which were lower than ICC-established rates, thereby discriminating against interstate shippers in favor of Texas shippers. *Id.*

63. *Id.*

64. See Noam, *supra* note 5, at 954. The *Shreveport* decision solidified federal dominance over state railroad regulation. "By analogy to the *Shreveport* cases, the states' authority in the telephone area became tenuous; the states ultimately were only as powerful as the ICC allowed . . ." *Id.*; see also John R. Haring & Kathleen B. Levitz, *The Law and Economics of Federalism in Telecommunications*, 41 FED. COMM. L.J. 261, 292 (1988-89) (noting that state regulators feared that unless Congress expressly limited the ICC's authority over intrastate phone rates, the states would only have nominal control over intrastate networks and service. For additional background on the pivotal *Shreveport* decision and its effects, see Coleman, *The*

roads diminish in *Shreveport*⁶⁵ and were concerned that the same would happen to their authority over the intrastate telephone network.⁶⁶ Although the ICC did not immediately issue a *Shreveport*-type decision affecting telephone rates, state regulators feared a growing federal presence in the telephone field⁶⁷ and lobbied Congress for legislation expressly limiting the ICC's jurisdiction to interstate matters, thereby preserving state control over the intrastate portion of the phone network.⁶⁸

B. Post-1934: A Co-Regulatory Scheme

In February 1934, President Roosevelt proposed creating a single agency in which the existing authority of the ICC, Federal Radio Commission and Postmaster General would be consolidated.⁶⁹ Because the Roosevelt Administration essentially requested that regulatory authority over communications be centralized rather than changed, "Congress indicated its intent to

Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases, 28 HARV. L. REV. 34 (1914) (criticizing the court's decision).

65. Haring & Levitz, *supra* note 64, at 292.

66. *Id.*

67. As if fulfilling the state regulator's prophecy, the ICC rendered an expansionist reading of the Mann-Elkins Act in *Telephone & Railroad Depreciation Charges*, 118 I.C.C. 377 (1926). See Graham, Note, *supra* note 55, at 740. The decision involved the ICC's attempt to mandate a uniform system of depreciation for telephone equipment. The states argued that this aspect of the telephone business was beyond the ICC's jurisdiction because the states had always regulated costs associated with telephone equipment. 118 I.C.C. at 378. The ICC rejected the states' argument and concluded that setting a uniform system of depreciation was within its powers, just as it was within its power to set local shipping rates for the railroads. *Id.*

In 1931, the Supreme Court upheld ICC jurisdiction over interstate telephone service in *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930), *conformed to*, *Illinois Bell Tel. Co. v. Gilbert*, 3 F. Supp. 595 (D. Ill. 1933), *rev'd sub nom. Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151 (1934). The Illinois public utility commission issued an order prescribing rates for Illinois Bell. *Id.* at 135. Illinois Bell then obtained an order from the federal district court enjoining enforcement of the rates. *Id.* The Supreme Court ultimately remanded the matter. *Id.* at 148. In deciding to remand, the Court stressed the importance of "the appropriate recognition of the competent governmental authority in each field of regulation." *Id.* The Court held that Illinois Bell's interstate service was within the ICC's jurisdiction although its intrastate service was within the state's jurisdiction. *Id.* at 149.

68. Graham, Note, *supra* note 55, at 740.

69. See President Roosevelt's Message to Congress Recommending that Congress Create a New Agency to be Known as the Federal Communications Commission, Feb. 26, 1934, reprinted in H.R. Rep. No. 1850, 73d Cong., 2d Sess., pt. 1, at 1-2 (1934). Although the ICC controlled the telephone network prior to the enactment of the Communications Act in 1934, the Federal Radio Commission regulated the country's radio network. 44 Stat. 1162 (1927). See Comment, *Federal Control of Radio Broadcasting*, 39 YALE L.J. 245 (1929). Scholars agree, however, that the Radio Commission was ineffective at best, having "failed to live up to congressional expectations." Graham, Note, *supra* note 55, at 744.

change the forum, but generally not the content, of federal regulatory authority, over communications."⁷⁰

During the debates surrounding the passage of the Act, the National Association of Regulatory Commissions (NARUC), an association of state PUCs, requested that language be included in the Act to prevent the ICC from applying the *Shreveport* rationale to the telephone industry.⁷¹ NARUC argued that Congress should expressly limit the jurisdiction of the newly created Commission to prevent it from preempting state regulation of intrastate telephone matters as the ICC had done in the railroad industry.⁷² Lobbying efforts resulted in the inclusion of section 152(b) in the Communications Act.⁷³ By its plain language, section 152(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"⁷⁴ By carving out a sphere of

70. Matthew S. Bewig, *Federalism and Telecommunications: On the Right Wavelength?* 59 GEO. WASH. L. REV. 1190, 1193 (1991) (citing H.R. REP. NO. 1850, 73d Cong., 2d Sess. 3 (1934)), reprinted in A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 99 (1989) (noting that "[t]he bill is largely based upon existing legislation and except for the change of administrative authority does not vary greatly change or add to existing laws"). But see Loeb, *supra* note 52, at 20-22 (discussing subtle differences between authority of the FCC under the Communications Act and the authority of the ICC under the Mann-Elkins Act).

71. McKenna, *supra* note 5, at 9.

72. Graham, Note, *supra* note 55, at 745. John Benton, a state commission lobbyist, expressed the state regulators' fear of the *Shreveport* rationale being applied to telephone regulation in his 1943 congressional testimony:

The Interstate Commerce Commission has the same power now to override State regulation in the telephone field as it has in the railroad field, although in the railroad field more than 85 percent of the business is interstate, while in the telephone field less than 2 percent of telephone messages are interstate. . . . Unless the Congress wishes to bring control of local telephone business, which is now subject to State regulation under the domination of the [Federal Communications Commission], it cannot merely transfer the existing power of the Interstate Commerce Commission to this new commission. It must describe the field within which the new commission shall operate.

Hearings on H.R. 8301 Before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. 135-36 (1934).

73. Bewig, *supra* note 70, at 1194; see also McKenna, *supra* note 5, at 13 (noting that the bills introduced in 1934 were meant to create a "scheme of dual regulation that negated the *Shreveport* doctrine"); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 216 n.99 (D.C. Cir. 1982) (noting congressional intent in adopting section 152(b) of the Act to prevent application of *Shreveport* doctrine in telecommunications), *cert. denied*, 461 U.S. 938 (1983); *Telerent Leasing Corp.*, 45 F.C.C. 2d 204 (1974), *aff'd sub nom.* *North Carolina Util. Comm'n. v. FCC* (NCUC I), 537 F.2d 787, 793 n.6 (4th Cir.) (referring to congressional reports which supported their argument that section 152(b) of the Act was meant to prevent a *Shreveport*-type decision in telecommunications), *cert. denied*, 429 U.S. 1027 (1976); *Sablowsky v. United States*, 101 F.2d 183 (3d Cir. 1938) (interpreting section 152(b) as being designed to allow the FCC jurisdiction over all interstate and foreign communication).

74. 47 U.S.C. § 152(b) (1988).

regulatory jurisdiction for the states in section 152(b), Congress created a dual regulatory scheme under which the states and the FCC would ultimately find themselves on opposite sides of the regulatory fence.⁷⁵

During the decades immediately following the passage of the Act, both federal and state agencies concurrently regulated the same facilities.⁷⁶ Few jurisdictional conflicts arose because both federal and state regulatory bodies shared the same goals.⁷⁷ Both the FCC and state regulatory agencies agreed that local rates should remain low, that long-distance customers should contribute to the costs of the local network and that telephone monopolies were necessary.⁷⁸

This cooperative system began to crumble, however, when federal and state regulatory goals diverged. The Commission began embracing concepts of market efficiency and competition,⁷⁹ while the states continued emphasizing cross-subsidies, low rates and consumer-oriented regulation.⁸⁰ In fact, state regulators objected to competition, fearing it would upset the system of cross-subsidies which had kept local telephone rates low and customers complacent.⁸¹ Viewing competition as the guarantor of a truly rapid, efficient and nationwide communications network, the FCC, despite resistance from

75. McKenna, *supra* note 5, at 13; see also Graham, Note, *supra* note 55, at 747. In addition to section 152(b), 221(b) also prohibits the FCC from regulating specific intrastate matters. In particular, section 221(b) provides:

[N]othing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . telephone exchange service, . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by a local government authority.

47 U.S.C. § 221(b) (1988). Commentators note that this separation between the intrastate and interstate portions of a telephone service or facility occurs at the exchange level per section 221(b). Graham, Note, *supra* note 55, at 747. In effect, facilities on the subscriber's side of the local exchange facility were considered intrastate while facilities located between the local exchanges and which crossed state lines were considered interstate. *Id.*

76. Bewig, *supra* note 70, at 1196; see also Haring and Levitz, *supra* note 64, at 293 (noting that state and federal regulators engaged in a co-regulatory scheme in which both shared the responsibility of developing and maintaining a national telecommunications network).

77. *Id.* The FCC's regulatory philosophy was the same as that of the states. Both had made a "commitment to universal service, affordable rates to residential subscribers, and a unified national network based on the integrity of AT&T." Noam, *supra* note 5, at 956.

78. Bewig, *supra* note 70, at 1196.

79. Noam, *supra* note 5, at 956; Bewig, *supra* note 70, at 1196 (describing the deterioration of the cooperative regulatory system as the FCC began embracing competition and preempting prohibitive state regulations).

80. Noam, *supra* note 5, at 956.

81. McKenna, *supra* note 5, at 4.

the states, began preempting state regulations which it felt stifled competition.⁸²

II. DEVELOPMENT OF A PREEMPTION TEST UNDER THE COMMUNICATIONS ACT

A. General Preemption Principles

The doctrine of preemption stems from the Supremacy Clause of the United States Constitution.⁸³ The federal government may preempt state law in one of three ways.⁸⁴ First, Congress may explicitly state its intent to

82. In the late 1950s and early 1960s, the FCC began introducing competition in several markets, such as customer premise equipment (CPE) and data processing services. See *Use of the Carterphone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (forbidding prohibitions against attachments of non-AT&T equipment and discouraging competitive entry into the telephone equipment market), *aff'd on rehearing*, 14 F.C.C.2d 571 (1968); *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.) (upholding FCC decision to preempt state regulation of the interconnection of customer phone equipment), *cert. denied*, 429 U.S. 1027 (1976); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982) (upholding FCC decision to preempt state regulation of enhanced services), *cert. denied*, 461 U.S. 938 (1983). Although this Note focuses on the FCC's procompetitive policy in the CPE and enhanced services markets, the Commission introduced competition in several other areas. See, e.g., *Above 890 MHz*, 27 F.C.C. 359 (1959) (authorizing private microwave systems), *recon. denied*, 29 F.C.C. 825 (1960); *Applications of Microwave Communications, Inc. (MCI)*, 18 F.C.C. 2d 953 (1969) (allowing, for the first time, a new entrant in facilities-based services market), *recon. denied*, 21 F.C.C.2d 190 (1970); *First Report and Order, Domestic Communications - Satellite Facilities*, 22 F.C.C.2d 86 (1970) (insisting on competitive entry in the new domestic satellite industry); *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service*, 29 F.C.C.2d 870 (1978) (establishing general policy encouraging new entry in commercial private line market), *recon. denied*, 44 F.C.C.2d 467 (1973), *aff'd sub nom. Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

83. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

84. In 1985 Justice Thurgood Marshall, for a unanimous Court, summarized the three-part preemption analysis as follows:

It is a familiar and well-established principle that the Supremacy Clause invalidates state laws that "interfere with, or are contrary to," federal law. Under the Supremacy Clause, federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. In the absence of express pre-emptive language, Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation. Pre-emption of a whole field also will be inferred where the field is one in which "the

preempt state action.⁸⁵ Second, courts may imply congressional intent to preempt state action where federal legislation completely occupies a given field.⁸⁶ Finally, preemption may be implied where the state action would actually conflict with the federal law or its purposes.⁸⁷ Under this third test, state law is preempted if compliance with both federal and state law is impossible or if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸⁸

Preemption analysis begins with a determination of Congress' intent in enacting or deciding not to enact a statute.⁸⁹ Because Congress rarely expresses an intent to preempt,⁹⁰ states and the courts must often infer congressional intent by looking to the legislation's terms, history and objectives.⁹¹

In 1982, the Supreme Court further held that federal agency regulations have the same preemptive effect as federal statutes.⁹² The Court explained

federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility" or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712-13 (1985) (citations omitted). See generally WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 346 (5th ed. 1980) (defining preemption as the effect of federal legislation which restricts state power).

85. See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

86. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

87. See, e.g., *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

88. *Hillsborough County*, 471 U.S. at 713 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); see also *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986) (barring enforcement of Mississippi rule which undermined congressional objective of allowing market forces to determine supply and demand for gas); *McDermitt v. Wisconsin*, 228 U.S. 115 (1913) (barring enforcement of Wisconsin regulation because impossible to comply with both state and federal syrup-labelling rules).

89. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982); see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (Congress will be deemed to have preempted an area where either intent is unmistakable or where nature of the regulated subject matter permits no other conclusion).

90. See Stahl, note, *supra* Note 5, at 527.

91. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 232-36 (1947) (ascertaining federal intent to preempt after looking at legislative history and language); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 203-06 (1944) (examining history of federal regulation in a particular area to ascertain whether state authority must yield to federal control); see also Kenneth L. Hirsch, *Toward A New View of Federal Preemption*, 1972 U. ILL. L.F. 515; Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

92. *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153.

that when a state challenges an agency's regulation, the issue is whether the agency was acting within its delegated authority when it enacted the regulation.⁹³

B. Preemption Prompted By Competition

In its 1968 decision, *Use of the Carterfone Device in Message Toll Telephone Service*,⁹⁴ the Commission, for the first time, used section 151 as the basis for preempting state regulations. In *Carterfone*, the Commission decided that a common carrier could not refuse interconnection for a customer-provided mobile radio-telephone device.⁹⁵ Outraged, phone companies and state PUCs argued that non-carrier provided equipment would jeopardize the integrity of the national network and competition would significantly increase the price for basic services.⁹⁶ The PUCs also argued that the FCC could not assert jurisdiction over customer premises equipment (CPE) interconnection because section 152(b) of the Act denied the FCC authority over intrastate matters, and, according to the states, CPE interconnection was clearly an intrastate matter.⁹⁷

Private telephone equipment manufacturers petitioned the FCC to rule that state PUCs, like those in North Carolina and North Dakota which had issued rulings banning interconnection of CPE to their respective intrastate phone networks, could not restrict or regulate the interconnection of CPE in any way that conflicted with FCC regulations.⁹⁸ The manufacturers argued that such attempts to regulate or restrict interconnection were preempted by the FCC's *Carterfone* decision.⁹⁹

93. *Id.*

94. 13 F.C.C.2d 420, *aff'd on rehearing*, 14 F.C.C.2d 571 (1968).

95. Note, *Competition in the Telephone Equipment Industry: Beyond Telerent*, 86 YALE L.J. 538, 541 (1977). In so doing, the Commission finally adopted the District of Columbia Circuit's 1956 decision in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956). In *Hush-A-Phone*, the court held for the first time that phone subscribers could attach equipment to their phones as long as the attachment did not harm the public network. 238 F.2d at 268.

96. Note, *supra* note 95, at 548. At best, state commissions and AT&T had weak arguments. By requiring customers to install an interface mechanism before interconnecting their non-carrier provided equipment, the Commission guaranteed the network's technical integrity. Furthermore, the prediction that competition in the CPE market would raise prices because the phone companies would subsidize their basic telephone rates with revenues from their equipment sale was sharply criticized as lacking any evidence. *Id.*

97. *Id.*

98. *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 220 (1974), *aff'd sub nom.* *North Carolina Util. Comm'n. v. FCC (NCUC I)*, 537 F.2d 787, 790 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

99. *Telerent Leasing*, 45 F.C.C.2d at 207-09.

The Commission responded to the North Carolina and North Dakota bans on CPE interconnection by preempting the ruling and setting forth "terms and conditions" governing CPE interconnection in *Telerent Leasing Corp.*¹⁰⁰ Because telephone equipment is "used for both local and long distance telephone calls,"¹⁰¹ the Commission reasoned that state regulations prohibiting interconnection affected interstate as well as intrastate service. The FCC then concluded it could preempt because these state regulations conflicted with the FCC's section 151 plenary authority over the interstate telephone network.¹⁰²

The PUCs appealed the *Telerent* decision to the United States Court of Appeals for the Fourth Circuit. In *North Carolina Utility Commission v. FCC (NCUC I)*,¹⁰³ a divided court developed a two-prong test to resolve the jurisdictional dispute revolving around sections 151 and 152(b) of the Act.¹⁰⁴ In interpreting the scope of section 152(b)'s limitation on federal authority, the court first looked to the FCC's broad grant of jurisdiction under section 151 of the Act and found that the Commission's jurisdiction included "all instrumentalities, facilities [and] apparatus" incident to interstate communications.¹⁰⁵ The court, reconciling section 152(b)'s reservation of state authority over intrastate matters with section 151's broad grant of jurisdiction, looked to the Act's legislative history and found support for its conclusion that the FCC "must remain free to determine what [CPE] can . . . be interconnected with the interstate communications network."¹⁰⁶ The court then focused on section 152(b) and concluded that, based on the Act's plain language, legislative history and previous Commission action, section 152(b) should not be interpreted as a sanction for any state regulation that "in effect encroaches substantially upon the Commission's authority."¹⁰⁷ Of

100. *Id.* at 220.

101. *Id.* at 215. The FCC based its authority to regulate an interstate carrier's interconnection policy on its federal mandate. Under the Communications Act, 47 U.S.C. §§ 201-205 (1988), Congress commanded the FCC to ensure that carriers followed "just and reasonable" practices. The FCC interpreted the Communications Act in *Telerent*: "[T]he Commission's powers to regulate interstate and foreign communications services are comprehensive and pervasive and embrace the terms and conditions under which customers shall be reasonably permitted to use their own equipment in connection with such services." 45 F.C.C.2d at 217.

102. *Id.* at 215.

103. 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

104. Stahl, Note, *supra* note 5, at 529-32. Commentators agree that *NCUC I* articulated a two-prong test to resolve jurisdictional disputes arising under the Communications Act. See Haring and Levitz, *supra* note 64, at 299 (discussing fourth circuit's development of two-prong preemption test); Bewig, *supra* note 70, at 1198 (discussing both prongs of *NCUC I* preemption test).

105. 537 F.2d at 791 (quoting 47 U.S.C. § 151 (1988)).

106. *Id.* at 793.

107. *Id.*

special importance is the fact the court found that section 152(b) only preserved exclusive state control over matters "that in their nature and effect [were] separable from and [did] not substantially affect the conduct or development of interstate communications."¹⁰⁸ Affirming the FCC's preemptive order, the court noted that because most CPE was used for both interstate and intrastate communications,¹⁰⁹ it was impossible to separate into interstate and intrastate components. Accordingly, the court reasoned that a state's equipment policies necessarily affected interstate communications.¹¹⁰ Because state regulation of CPE had a substantial impact on interstate communications, the Fourth Circuit ruled that the Commission had properly preempted state regulations barring interconnection of CPE.¹¹¹

The Fourth Circuit's two-prong "inseparability/substantial impact" test broadened the scope of Commission authority over intrastate communications.¹¹² Under this two-prong test, the FCC could preempt state regulation of an intrastate matter, despite section 152(b), if the intrastate portion of the service/facility was inseparable from the interstate portion and the state regulation substantially affected interstate communications.¹¹³

C. Competition in the Enhanced Services Market

After preempting state regulations it feared would inhibit competition and interconnection in the CPE market, the FCC began using its authority pursuant to section 151 to preempt state regulations of enhanced services. In *Computer II*,¹¹⁴ the FCC concluded that "consistent with our overall statutory mandate, enhanced services should not be regulated under the Act,"¹¹⁵

108. *Id.*

109. *Id.* at 792.

110. *Id.* at 793.

111. *Id.*

112. See Bewig, *supra* note 70, at 1198 (noting that *NCUC I* recognized the FCC's expansive powers).

113. 537 F.2d at 793; see Richard McKenna, *Preemption Reversed: The Supreme Court's Decision in Louisiana Public Service Commission v. FCC*, 39 ADMIN. L. REV. 43, 46 (1987).

114. See *supra* note 26 and accompanying text. After finding that technology rendered its *Computer I* definitions of regulated and non-regulated services impracticable because they required the FCC to determine the service's status on a case by case basis, the FCC commenced *Computer II*. The FCC intended to change *Computer I*'s regulatory scheme to provide greater "certainty and practicability of regulation" and to enhance competition in the enhanced services industry. See *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); see also *Computer II Notice of Inquiry*, *supra* note 26, at 107.

In *Computer II*, the FCC retained its *Computer I* maximum corporate separation requirements for AT&T and the BOCs. *Computer II Final Decision*, *supra* note 26, at 385.

115. *Computer II Final Decision*, *supra* note 26, at 428.

and should remain unregulated by the states.¹¹⁶ The FCC stated, "[W]e have determined that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation."¹¹⁷

In the 1982 *Computer & Communications Industry Ass'n v. FCC (CCIA)*¹¹⁸ decision, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's preemption of state regulation of enhanced services and CPE.¹¹⁹ *CCIA* essentially affirmed the FCC's deregulatory scheme set out in *Computer II*.¹²⁰

Petitioners, primarily state PUCs, made two arguments. First, they contended the Commission erred in concluding it could deregulate enhanced services and CPE.¹²¹ Petitioners argued that Title II of the Act required the FCC to regulate carrier-provided enhanced services and CPE.¹²² Second, petitioners contended the FCC had invaded the states' ratemaking authority.¹²³

After explaining that the primary issue was whether the FCC had impermissibly deregulated enhanced services and CPE,¹²⁴ the court sustained the FCC's deregulation on two grounds. First, the court decided that the FCC's conclusion that enhanced services and CPE were not common carrier offerings was reasonable and well substantiated.¹²⁵ The court noted that the Act does not conclusively define common carrier, leaving the FCC some latitude in determining what is and is not a common carrier service subject to regulation.¹²⁶ The court recalled *National Ass'n of Regulatory Commissioners v. FCC (NARUC I)*¹²⁷ in which the Fourth Circuit defined common carrier as an entity which indiscriminately offered service to the public for hire.¹²⁸ Be-

116. *Computer II Further Reconsideration Order*, *supra* note 26, at 541.

117. *Id.* at 541 n.34.

118. 693 F.2d 198 (D.C. Cir. 1982) (affirming FCC deregulation of CPE and enhanced services because they were inseparable from and substantially affected the conduct and development of interstate communications), *cert. denied*, 461 U.S. 938 (1983). Two circuits, in addition to the Fourth and District of Columbia Circuits, have relied on the FCC's *NCUC I* two-prong test. See *New York Tel. Co. v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699-700 (1st Cir. 1977).

119. 693 F.2d at 220.

120. See *supra* note 26 and accompanying text.

121. 693 F.2d at 206.

122. *Id.* at 209-12.

123. *Id.* at 206.

124. *Id.*

125. *Id.* at 209-12.

126. *Id.* at 209-10.

127. *Id.*

128. *Id.* at 214; see also *supra* notes 28-29 and accompanying text.

cause enhanced services and CPE are offered on an individual, contractual basis, the court agreed that they are not common carrier offerings and that the FCC could deregulate them.¹²⁹

Secondly, the court evaluated the FCC's preemption of state regulation of enhanced services and CPE by reviewing the FCC's jurisdiction under the Act.¹³⁰ The court interpreted section 151 of the Act broadly, finding that it mandated the FCC to create a rapid and efficient nationwide telecommunication network.¹³¹ The court found that the FCC's goal of creating a fully competitive market would be frustrated by inconsistent state regulation of enhanced services and CPE. Consequently, the court sustained *Computer IP's* preemption.¹³²

D. Depreciation Rates and the Demise of the Two-Prong Test

In *Virginia State Corp. Commission v. FCC*,¹³³ the Fourth Circuit again applied its two-prong preemption test to uphold FCC preemption¹³⁴ of inconsistent state regulation of depreciation charges.¹³⁵ The court decided that although section 152(b) reserved regulation of intrastate communica-

129. 693 F.2d at 209-10, 218.

130. *Id.* at 207, 214-15.

131. *Id.* at 207.

132. *Id.*

133. 737 F.2d 388 (4th Cir. 1984), *rev'd sub nom.* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

134. In 1980 and 1981, the FCC issued two orders which instituted new depreciation and accounting regulations that facilitated more rapid capital recovery. Stahl, Note, *supra* note 5, at 533 (citing Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, 85 F.C.C.2d 818, 820 (1981) (Expensing Order) (providing that inside wiring would not be treated as a depreciable capital investment, but would be charged to current users); Amendment of Part 31, Uniform System of Accounts for Class A and Class B Telephone Companies, 83 F.C.C.2d 267, 271 (1980) (Depreciation Order) (mandating equal life and remaining life methods of depreciation)).

The rate at which physical plants and facilities depreciate determines the rate at which a carrier can recover its capital investment. McKenna, *supra* note 113, at 46. Traditionally, carriers used the "vintage group" method of depreciation. Stahl, Note, *supra* note 5, at 534 n.109. Using this method, one places all the assets which are put into service in the same year into a "vintage group." *Id.* A uniform dollar amount is then depreciated for each period the asset is used. *Id.* The "equal life" method, however, divides the vintage group into subcategories of assets which have the same service life. *Id.* Obviously, regulators favor long service lives because this helps keep rates low by spreading costs out over time. *Id.*

135. See Amendment of Part 31, Uniform System of Accounts for Class A and B Telephone Companies, 89 F.C.C.2d 1094 (1982) (Accounting Methods), *rev'd*, 92 F.C.C.2d 864 (1983) [hereinafter Preemption Decision], *aff'd sub nom.* Virginia State Corp. Comm'n v. FCC, 737 F.2d 388 (4th Cir. 1984), *rev'd sub nom.* Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

In January 1983, the FCC issued an order which preempted state regulation of depreciation charges inconsistent with rates set by the FCC. Preemption Decision, *supra*, at 879.

tions to the states, sections 152(b) and 221(b)¹³⁶ had to be interpreted in light of section 151's mandate that the FCC develop an efficient nationwide telecommunication network.¹³⁷

After applying the inseparability prong of the *NCUC I* test,¹³⁸ and finding that it was physically possible to separate interstate depreciation methods from intrastate methods, the court nevertheless concluded that the possibility of physical separation did not preclude the Commission from preempting the state regulation.¹³⁹ Applying the second prong of the *NCUC I* test, the court found that state depreciation regulations had a substantial impact on the development of interstate communications.¹⁴⁰ The court agreed with the FCC's determination that slow capital recovery,¹⁴¹ mandated by state regulations, would hinder competition and technological innovation.¹⁴² The court held that because inconsistent state regulation of depreciation rates prevented rapid development of interstate facilities, the FCC was justified in preempting the regulation despite being able to separate the depreciation rates into their intrastate and interstate components.¹⁴³

Judge Widener dissented from the majority's affirmation of FCC preemption.¹⁴⁴ He interpreted section 152(b) as an explicit reservation of state authority over local rates.¹⁴⁵ Judge Widener argued that the majority's decision would allow the Commission to freely preempt state regulation, contrary to the Act's provisions.¹⁴⁶

Dissatisfied with the Fourth Circuit's affirmation of the Commission's preemption, petitioners requested certiorari from the Supreme Court.

136. Section 221(b) of the Act provides the Commission with the authority to prescribe depreciation schedules for common carriers. 47 U.S.C. § 221(b) (1988).

137. 737 F.2d at 392.

138. See Stahl, Note, *supra* note 5, at 542. Some commentators have noted that the Fourth Circuit misapplied its own test by relying exclusively on the test's second prong. Because the court and the FCC both found that depreciation rates were reducible to intrastate and interstate components, the court had to rely exclusively on the test's second prong to uphold the preemption. *Virginia State*, 737 F.2d at 392.

139. 737 F.2d at 392.

140. *Id.* at 396.

141. See Preemption Decision, *supra* note 135, at 876. The FCC found that phone companies needed faster capital recovery rates to encourage technological innovation and help them compete with new entrants into the market. *Id.*

142. 737 F.2d at 394.

143. *Id.* at 396.

144. *Id.* at 398.

145. *Id.*

146. *Id.*

III. LOUISIANA PSC: SHAKING THE FOUNDATION OF FCC PREEMPTION

In *Louisiana Public Service Commission v. FCC (Louisiana PSC)*,¹⁴⁷ the Supreme Court reversed the Fourth Circuit's decision in *Virginia State Corp.*, holding instead that the language, structure, and legislative history of section 152(b) best supported an interpretation of that section as prohibiting the FCC from requiring state commissions to follow FCC depreciation practices for intrastate ratemaking purposes.¹⁴⁸

The Commission first argued that it had sole regulatory authority over depreciation rates pursuant to sections 151 and 220 of the Act.¹⁴⁹ The Commission then argued that inconsistent state depreciation methods, which tended to favor a slow rate of depreciation, prohibited the FCC from fulfilling its policy of creating a competitive telephone industry.¹⁵⁰

Contrary to the FCC's expansive interpretation of section 151, the Court interpreted the section as only lending "some support" to the FCC's argument that state regulations which frustrated Commission attempts to create a rapid and efficient nationwide phone network were "impliedly barred by the Act."¹⁵¹ The Court agreed with the state PUCs that sections 151 and 152(b) created a dual regulatory system, splitting the jurisdictional burden between the states and federal government.¹⁵² The Court thereupon rejected the FCC's argument that section 152(b) was only intended to protect the state PUCs' authority to set individual customer charges for specific intrastate services.¹⁵³ The Court also rejected the FCC's argument that section 152(b) was only intended to prevent the Commission from setting local rates, as the ICC had done in *Shreveport*.¹⁵⁴ By rejecting the Commission's interpretation of the purpose and scope of section 152(b), the Supreme Court implicitly rejected the basis and rationale for upholding FCC preemption relied on in *CCIA* and *NCUC I*.¹⁵⁵ Recall that both courts of appeals' deci-

147. 476 U.S. 355 (1986).

148. *Id.* at 359. For a detailed analysis of the *Louisiana PSC* opinion, see Bewig, *supra* note 70.

149. *Id.* at 362. Section 220 of the Act requires the FCC to prescribe depreciation rates for common carriers. 47 U.S.C. § 220 (1988).

150. 476 U.S. at 363; *see also supra* note 134.

151. *Id.* at 370.

152. *Id.* at 371.

153. *Id.* The Court characterized the FCC's interpretation of section 152(b) as a "narrow reading," not supported by the common industry practice of using the term "charges" to refer to depreciation methods. *Id.*

154. *Id.* at 372. The FCC successfully argued in a number of cases that section 152(b)'s legislative history supported its argument that the section was adopted only to preserve state control over setting local rates. *See supra* note 59 and accompanying text.

155. The Court did not directly overrule *CCIA* and *NCUC I*. Instead, the opinion rejects the lower courts' interpretation of the purpose and meaning of section 152(b).

sions had agreed with the FCC's interpretation of section 152(b) as only being a precautionary measure, enacted to prevent the application of a *Shreveport*-type decision in the telecommunication field.¹⁵⁶

In addition to casting a shadow over the court of appeals' interpretations of the scope and purpose of section 152(b) in *NCUC I*, *CCIA*, and *Virginia State Corp.*, the Court also discounted the inseparability prong of *NCUC I*'s preemption test. The Court emphasized the role of section 410(c) of the Act,¹⁵⁷ pointing out that this section provides the means for regulators to separate a combined service or facility into its intrastate and interstate components.¹⁵⁸ The Court held that section 410(c)'s separation process precluded the FCC from using an inseparability argument to justify preemption of state depreciation methods.¹⁵⁹

The *Louisiana PSC* Court clearly set forth the scope of FCC preemption with respect to regulation of depreciation rates, but left unanswered questions regarding the scope of FCC preemption in other areas. Given the Court's expansive reading of section 152(b), the entire decision may be interpreted as an outright ban on FCC preemption of any intrastate matter. In footnote four, however, Justice Brennan provided the Commission with a possible basis for preemption by pointing out that cases involving regulation of depreciation rates are "readily distinguishable from those [cases] in which FCC pre-emption of state regulation was upheld where it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation" and the state regulation, therefore, made it impossible for the FCC to achieve a valid federal goal.¹⁶⁰ Three cases decided since *Louisiana*

156. See *supra* notes 106-08, 130-32, 135-37.

157. 476 U.S. at 374. The FCC argued that section 152(b) did not ban federal regulation of depreciation charges for intrastate ratemaking purposes because

the plant involved . . . is used interchangeably to provide both interstate and intrastate service, and . . . [section 152(b)] should be "confined to intrastate matters which are 'separable from and do not substantially affect' interstate communications." . . .

[T]he refusal of the States to employ accurate measures of depreciation will have a severe impact on the interstate communications network.

Id. at 373 (citation omitted); see McKenna, *supra* note 113, at 49.

158. Section 410(c) of the Act provides: "[t]he Commission shall refer any proceeding regarding the jurisdictional separation of common carrier property and expenses between interstate and intrastate operations, . . . to a Federal-State Joint Board." 47 U.S.C. § 410(c) (1982); see also *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930) (the Supreme Court mentioned, for the first time, separating interstate and intrastate facilities and services as a means of resolving jurisdictional disputes), *conformed to*, *Illinois Bell Tel. Co. v. Gilbert*, 3 F. Supp. 595 (D. Ill. 1933), *rev'd sub nom. Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151 (1934).

159. 476 U.S. at 369.

160. *Id.* at 375 n.4 (emphasis in original). The Court then cites *NCUC II*, explaining in a parenthetical that the "FCC acted within its authority to permit subscribers to provide their own telephones . . ." *Id.*

PSC have helped reconcile footnote four with the body of the Court's opinion and the body of case law upholding FCC preemption.

IV. PREEMPTION DESPITE *LOUISIANA PSC*: THE APPELLATE COURT TRILOGY

Three United States Court of Appeals for the District of Columbia Circuit decisions have interpreted *Louisiana PSC* as recognizing an impossibility exception to section 152(b) and have upheld FCC preemption of state regulation. In *National Association of Regulatory Utility Commissioners v. FCC (NARUC III)*,¹⁶¹ the court held that the FCC could preempt state regulation when the state regulation "negated" an FCC regulation.¹⁶² In *NARUC III*, after reviewing an FCC order which preempted state regulation of the installation and maintenance of inside wiring,¹⁶³ the court decided that even under *Louisiana PSC* the FCC could preempt state regulations of an intrastate matter.¹⁶⁴ Specifically, the court noted that legitimate state regulation of intrastate telephone service could in fact interfere with the Commission fulfilling its goal of creating a competitive inside wiring market.¹⁶⁵ Accordingly, the court held that the FCC can preempt state regulation of inside wiring to the extent that the state regulation negates the federal policy of creating a competitive inside wiring market.¹⁶⁶

The court used this same analysis in upholding FCC preemption in *Illinois Bell Telephone Co. v. FCC*.¹⁶⁷ In *Illinois Bell*, five BOCs challenged an FCC order preempting state regulation of marketing services, such as Centrex, which the BOCs claimed were purely intrastate.¹⁶⁸ Illinois Bell contended

161. 880 F.2d 422 (D.C. Cir. 1989).

162. *Id.* at 429.

163. "Inside wiring" consists of the telephone wires located on the customer's end of the connection between the customer and the phone company inside a customer's home or business. *California v. FCC*, 905 F.2d 1217, 1241 n.37 (9th Cir. 1990) (quoting *NARUC II*, 880 F.2d at 425). The FCC's "preemption" amounted to a requirement that the states unbundle inside wiring from basic transmission service. See *Detariffing the Installation and Maintenance of Inside Wiring*, 1 F.C.C.R. 1190, 1192 (1986).

164. 880 F.2d at 429.

165. *Id.* at 430.

166. *Id.* at 431. The court actually remanded part of the FCC's preemption order. Petitioners argued that if the FCC unbundled inside wiring charges from basic service charges, customers could find alternative inside wiring providers, thereby promoting a competitive inside wiring market. *Id.* at 429-30. The court remanded the preemptive order because the Commission failed to prove that even if it did unbundle charges for inside wiring from basic service charges, the state regulations it wanted to preempt would still have thwarted the FCC's goal of a competitive inside wiring market.

167. 883 F.2d 104 (D.C. Cir. 1989).

168. *Id.* at 108. Centrex is a tariffed service sold by local phone companies. *National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC II)*, 737 F.2d 1095, 1122 (D.C. Cir.

that because the FCC's preemptive order would inevitably affect charges for intrastate communication services, the FCC had exceeded its jurisdiction under *Louisiana PSC*.¹⁶⁹

The court disagreed with Illinois Bell's characterization of Centrex as a purely intrastate service, and instead agreed with the FCC's finding that Centrex "support[s] interstate as well as intrastate communications."¹⁷⁰ In upholding the FCC's preemptive order, however, the court stated that before it could preempt, the FCC had to show that it could not separate the service into its interstate and intrastate components.¹⁷¹

Finally, in *Public Utilities Commission of Texas v. FCC (ARCO)*,¹⁷² the court reviewed an FCC order which preempted an order issued by the Texas Public Utilities Commission (Texas PUC).¹⁷³ The Texas PUC order prohibited a customer, who operated an FCC-licensed microwave communication network, from choosing his point of interconnection with the public switched network.¹⁷⁴

Southwest, a Bell Operating Company, is the state certified telephone monopoly for the area including Dallas, Texas.¹⁷⁵ GTE Southwest, the wholly owned subsidiary of GTE Corporation, has an exclusive state franchise for an area including Plano, Texas.¹⁷⁶ In 1983, ARCO leased trunk lines from Southwest to carry communications from Plano to points beyond Plano.¹⁷⁷ The Texas PUC prohibited Southwest from leasing trunks to ARCO because the Texas Public Utility Regulatory Act¹⁷⁸ prohibited public utilities from serving, either directly or indirectly, a facility within another utility's franchise area.¹⁷⁹ The FCC, which regarded ARCO's private microwave

1984), *cert. denied*, 469 U.S. 1227 (1985). Centrex offers communications functions such as "intercom calling, conference calling, direct inward dialing, and automatically identified outward dialing." *Id.*

169. 883 F.2d at 112.

170. *Id.* at 114.

171. *Id.* at 114-15.

172. 886 F.2d 1325 (D.C. Cir. 1989).

173. *Id.* For a detailed analysis of the *ARCO* decision, see Bewig, *supra* note 70. See also Haring Levitz, *supra* note 64 (discussing D.C. Circuit's interpretation and application of *Louisiana PSC* in *Arco*).

174. Customers who have a private network still need access to the public network so as to interconnect their private branch exchange (PBX) switchboard to the local telephone company. 886 F.2d at 1328. Recall that a PBX is a customer-provided switch that automatically transfers, or switches, calls between the customer's private telephone station and other locations.

175. *Id.* at 1327.

176. *Id.*

177. *Id.*

178. TEX. REV. CIV. STAT. ANN. art. 1446(c), § 50 (Vernon 1980 & Supp. 1989).

179. 886 F.2d at 1328-29.

system as a type of customer equipment,¹⁸⁰ preempted the Texas PUC's order, arguing that the case involved state regulations that conflicted with a customer's right to interconnect to the publicly switched interstate network in a way that was privately beneficial without being publicly detrimental.¹⁸¹ The court upheld the FCC's preemption. The court explained that in *Louisiana PSC*, the "Court implicitly recognized . . . that the FCC may . . . preempt conflicting state rules where the FCC cannot 'separate the interstate and the intrastate components of [its] asserted . . . regulation.'"¹⁸² The court concluded that the FCC had met its burden of showing that the state regulation made it impossible for the FCC to fulfill its goal of making interstate communications fully competitive.¹⁸³

Thus, according to *NARUC III*, *Illinois Bell*, and *ARCO*, the FCC can preempt state regulation of an intrastate matter if the state regulation makes it impossible for the FCC to promote a federal policy. Although these three appeals court cases clarify the scope of FCC preemption of state regulation of inside wiring,¹⁸⁴ CPE interconnection¹⁸⁵ and telephone services,¹⁸⁶ questions remain concerning the scope of the Commission's authority to preempt state regulation of enhanced services.

V. CALIFORNIA V. FCC: PREEMPTION PREEMPTED

In 1986, the Commission commenced *Computer III*,¹⁸⁷ its third attempt to develop an effective regulatory structure for the provision of enhanced services. In *Computer III*, the Commission concluded that it would be in the public interest to permit AT&T and the BOCs to integrate their basic and enhanced services.¹⁸⁸ The FCC also decided that more stringent structural separation requirements imposed by the states would interfere with its pro-competitive policies and that facilities used by common carriers to provide basic and enhanced services could not practicably be separated into their

180. *Id.* at 1330.

181. *Atlantic Richfield Co.*, 3 F.C.C.R. 3089, 3092 (1988).

182. 886 F.2d at 1331 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986) (alterations and omissions made by court)).

183. *Id.* at 1335.

184. *See* *National Ass'n of Regulatory Util. Comm'rs v. FCC (NARUC III)*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985); *see also supra* notes 161-64, 169 and accompanying text.

185. *See Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989); *see also supra* notes 97-119, 171 and accompanying text.

186. *See Public Util. Comm'n v. FCC (ARCO)*, 886 F.2d 1325 (D.C. Cir. 1989); *see also supra* notes 118-36, 176 and accompanying text.

187. *See supra* note 37 and accompanying text.

188. *Computer III Phase I Order*, *supra* note 37, at 428-30, paras. 114-18.

intrastate and interstate components.¹⁸⁹ Accordingly, the FCC preempted state regulations imposing structural separation requirements or inconsistent nonstructural safeguards on the enhanced service operations of AT&T and the BOCs.¹⁹⁰ The FCC also preempted states from imposing structural separation requirements or nonstructural safeguards on the independent telephone companies (ITCs) which were more stringent than those which the Commission imposed on AT&T and the BOCs.¹⁹¹

The United States Court of Appeals for the Ninth Circuit vacated and remanded the FCC's *Computer III* preemption order.¹⁹² In its decision, the court addressed the pivotal issue of whether section 152(b) prohibits FCC preemption of state regulation of enhanced services by distinguishing basic from enhanced services.¹⁹³ Recall that in both *Computer II* and *Computer III*, the FCC premised its deregulation and resulting preemption on the fact that enhanced services are not common carrier services.¹⁹⁴ By finding that section 152(b) does not differentiate between basic and enhanced services, the Ninth Circuit undermined the basis for FCC preemption of state regulation of enhanced services.

The FCC, by defining enhanced services as non-common carrier services in *Computer II*, precluded the states from regulating such services pursuant to section 152(b), which, per the FCC's interpretation, applies only to common carrier intrastate matters.¹⁹⁵ Recall that the FCC argued in both *Computer I* and *Computer II* that section 152(b)'s language, "for or in connection with intrastate communication service by wire or radio of any carrier,"¹⁹⁶ means that section 152(b) applies only to telecommunication services offered on a common carrier basis¹⁹⁷ because "carrier" is the same as "common

189. *Computer III* Phase I Reconsideration Order, *supra* note 37, at 3062, para. 188.

190. *Id.*

191. *Computer III* Phase II Order, *supra* note 37, at 3072, 3102, para 210.

192. *California v. FCC*, 905 F.2d 1217, 1246 (9th Cir. 1990).

193. *Id.* at 1239. This Note deals exclusively with the issue of the Commission's preemption of state regulation of the provision of enhanced services by common carriers. The opinion treats two additional issues. First, the court decides that the FCC's decision to allow the BOCs to integrate their unregulated and regulated services was arbitrary and capricious and, therefore, violative of section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(a) (1988). *Id.* at 1230. Second, the court addresses the FCC's argument that the petitioner's challenge to the Commission's preemptive order was barred by *res judicata*, because the court in *CCIA* had already affirmed the FCC's preemptive authority. *Id.* at 1245. The court dismisses the Commission's argument as "misplaced." *Id.*

194. *See supra* notes 28-29, 117 and accompanying text.

195. *See Computer II* Final Decision, *supra* note 26, at 432 (explaining that enhanced services, as opposed to basic services, are not regulated as common carrier services because they are "custom tailor[ed] . . . to the particularized needs of the [] individual customers").

196. 47 U.S.C. § 152(b)(1) (1988).

197. 905 F.2d at 1239-40.

carrier" pursuant to the Act.¹⁹⁸ The FCC contended that because AT&T, the BOCs and the ITCs do not offer enhanced services on a common carrier basis,¹⁹⁹ enhanced services are not subject to Title II common carrier regulation and are therefore not reserved to the states for regulation pursuant to section 152(b).²⁰⁰

The FCC argued, in the alternative, that its preemption orders fell within the "impossibility" exception to section 152(b) which the Supreme Court recognized in *Louisiana PSC*.²⁰¹ The FCC maintained that its preemption of state-imposed nonstructural safeguards was valid because state regulation thwarted *Computer IIP's* regulatory scheme, making it impossible for the FCC to fulfill its goal of creating a fully competitive enhanced services market.²⁰²

On the other hand, state regulators argued that enhanced services are services within section 152(b)'s reach, because enhanced services are "nothing more than the transmission of electronic signals over the telephone network,"²⁰³ and are therefore "indistinguishable from basic services."²⁰⁴ They also argued that the Supreme Court's broad interpretation of section 152(b), as stated in *Louisiana PSC*, prohibits the FCC from regulating intrastate basic and enhanced services.²⁰⁵

The Ninth Circuit rejected the FCC's interpretation of section 152(b), characterizing it as a "cramped reading" of the Act.²⁰⁶ After reciting language from *Louisiana PSC* which interpreted section 152(b) as "fenc[ing] off from FCC reach or regulation" services which are delivered by a telephone carrier in connection with its intrastate common carrier telephone service,²⁰⁷ the court pointed out that enhanced services, delivered by common carriers on an intrastate basis over the telephone lines, fall within section 152(b)'s broad category of services reserved to the states for regulation.²⁰⁸ The court went on to hold that because communication common carriers provide enhanced services over the intrastate telephone network, enhanced services are common carrier services within the "regulatory domain of the states."²⁰⁹

198. 47 U.S.C. § 153(h) (1988) (equating "carrier" with "common carrier" for purposes of the Act).

199. 905 F.2d at 1239-40.

200. *Id.* at 1240.

201. *Id.* at 1242-43.

202. *Id.*

203. *Id.* at 1239.

204. *Id.*

205. *Id.*

206. *Id.* at 1240.

207. *Id.* (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986)).

208. *Id.* at 1240.

209. *Id.*

The court rejected the FCC's interpretation of section 152(b)'s "of any carrier" language as meaning that the section does not apply to non-common carrier services.²¹⁰ The court noted that by its plain language, section 152(b) applies to communication services provided by common carriers such as AT&T, as opposed to services provided by non-common carriers such as IBM.²¹¹ The court pointed out that while the statute distinguishes between types of providers, section 152(b) does not distinguish between the terms and conditions of the services the carriers provide.²¹² The court stated that if it adopted the FCC's interpretation of section 152(b)'s language and legislative history,²¹³ the court would have to qualify the language "for or in connection with intrastate communication service" by adding "which the carrier provides on a common carrier basis."²¹⁴ The court concluded that such a change could only be made by Congress.²¹⁵

The court also rejected the FCC's interpretation of section 152(b)'s legislative history.²¹⁶ The FCC argued that the section's legislative history demonstrates that section 152(b) only protects state jurisdiction over intrastate charges for carrier-provided telephone services.²¹⁷ The court, however, held that despite evidence that Congress's primary concern in enacting section 152(b) of the Act was protecting state jurisdiction over setting intrastate rates, "the language Congress chose reserved to the states expansive authority to regulate intrastate telecommunications."²¹⁸

The Ninth Circuit did agree with the FCC that *Louisiana PSC* requires courts and regulators to recognize an "impossibility exception" to section 152(b).²¹⁹ The court cited both *NARUC III*²²⁰ and *Illinois Bell*²²¹ as deci-

210. *Id.* at 1240-41.

211. *Id.* at 1240.

212. *Id.* The court said, "[T]he distinction made by the statute is between *providers* of communications services, i.e., between carriers and non-carriers. When services are provided by communications carriers, the statute makes no distinction based upon the terms and conditions on which the services are offered . . ." *Id.* (emphasis in original).

213. The FCC interpreted the language as denoting a legal difference between services offered on a common carrier basis and those offered on a non-common carrier basis. *See id.* The FCC interpreted the statute as distinguishing between the manner in which the service was offered, not between *who* offered it. *Id.* (emphasis added).

214. *Id.* at 1242.

215. *Id.* at 1241.

216. *Id.*

217. *Id.*

218. *Id.* (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 372-73 (1986)); *see also supra* notes 72-73 and accompanying text (offering ample evidence that section 152(b) was adopted in response to the *Shreveport* decision which allowed the ICC to set local shipping rates).

219. 905 F.2d at 1243.

220. 880 F.2d 422 (D.C. Cir. 1989).

221. 883 F.2d 104 (D.C. Cir. 1989).

sions based on the *Louisiana PSC* principle that the FCC can preempt if the state regulation makes it impossible for the FCC to implement its policies.²²² The court noted, however, that the impossibility exception is a narrow one, requiring the FCC to argue with “some specificity” that the state regulation negates the FCC’s regulation.²²³ The court went on to define *Louisiana PSC*’s “some specificity” language as meaning that the FCC has to “justify[] its *entire* preemption order by demonstrating that the order is narrowly tailored to preempt *only* such state regulations as would negate valid FCC regulatory goals.”²²⁴ After reviewing the record, the court held that *Computer III*’s orders preempting state structural safeguards and inconsistent non-structural safeguards were not limited to state regulation which would “necessarily thwart or impede” valid FCC goals.²²⁵

VI. IMPACT OF CALIFORNIA v. FCC

California v. FCC has created a new preemption test—one which severely limits the Commission’s authority to regulate enhanced services simultaneously provided on an intrastate and interstate basis. Thus, it substantially curtails the FCC’s section 151 authority to create a rapid and efficient *nationwide* telecommunication network.²²⁶ According to *California v. FCC*, the FCC can preempt state regulation, but only if: (a) the facility or service

222. 905 F.2d at 1242-43.

223. *Id.* at 1243.

224. *Id.* (emphasis in original).

225. *Id.* The FCC, in support of its policy of permitting common carriers to freely choose whether to integrate or separate their interstate operations, argued that any state requirement that a carrier separate its intrastate enhanced service and intrastate basic service will necessarily force the carriers to separate the interstate service from intrastate service, since intrastate and interstate portions of enhanced services are “structurally inseparable.” See *Computer III Phase I Reconsideration Order*, *supra* note 37, at 3062.

The court pointed out that this regulatory scheme, *i.e.*, prohibiting states from requiring structural separation for the provision of enhanced services, failed because the FCC had not considered the possibility that enhanced services, such as alarm services, could be offered on a purely local basis. The court faulted the FCC for not explaining how the “structural separation of such purely *intrastate* enhanced services from basic telephone service would interfere in any way with a carrier’s ability to provide *interstate* enhanced services . . . on an integrated basis.” 905 F.2d at 1244 (emphasis in original).

Regarding the FCC’s preemption of states’ regulations requiring inconsistent or more restrictive non-structural safeguards, the court faulted the FCC for not demonstrating why a state regulation requiring a common carrier to offer intrastate enhanced services through a separate corporate subsidiary would frustrate the FCC’s goal of allowing common carriers the freedom to choose whether to integrate or separate their interstate operations. *Id.* at 1244-45.

226. Richard E. Wiley & Howard D. Polsky, *New Turmoil in Telecommunications Policy*, *Legal Times*, Sept. 10, 1990, at 28, col. 1. Former FCC Commissioner, Richard Wiley, partner in the D.C. law firm Wiley, Rein & Fielding, says that this limit to FCC authority could “seriously impede the uniform deployment of enhanced services in this country.” *Id.*

cannot be separated into its interstate and intrastate components; and, (b) the regulation necessarily thwarts the FCC in implementing a federal policy. Whereas the Supreme Court in *Louisiana PSC* merely required the FCC to show, based on the record before it, that the state regulation prevented the FCC from promoting a valid FCC goal,²²⁷ the Ninth Circuit test requires the FCC to prove that it has tailored its entire order so that it preempts only those state regulations which thwart its goals.²²⁸ This burdens the FCC with proving that the state regulation conflicts with the federal regulation in any scenario.²²⁹ The administrative burdens inherent in this task will be overwhelming and prohibitive.²³⁰

California v. FCC has had the immediate effect of prompting the Commission to initiate two rulemaking proceedings to compile a record upon which to base its decision to eliminate structural separation requirements for the BOCs.²³¹ Also, according to FCC Chairman Alfred Sikes, the FCC has decided to handle the preemption issue on an ad hoc basis. In a statement made immediately following the court's decision, Chairman Sikes announced that the FCC intends "to act only where we believe there is improper encroachment on interstate communications, and frustration of industry's ability to offer services nationwide."²³²

In addition to imposing administrative burdens, *California v. FCC* sent the BOCs and enhanced service providers (ESPs) into a tailspin.²³³ Until the non-structural safeguard issue is settled, BOCs which began integrating enhanced and basic services pursuant to *Computer III* must develop separate

227. See *supra* note 160 and accompanying text.

228. 905 F.2d at 1243-44.

229. Kathleen Killete, *Bells Await Action*, COMM. WEEK Oct. 29, 1990, at 2. At a conference sponsored by the Federal Communications Bar Association to discuss *California v. FCC*'s impact, Attorney Thomas Sugrue, deputy assistant secretary for communications and information at the National Telecommunications and Information Agency, said that pursuant to *California v. FCC*, the Commission would have to prove "service by service and state by state, that state rules conflict with federal policy." *Id.*

230. Kathleen Killete, *How to Regulate?*, COMM. WEEK Nov. 11, 1990, at 13, 56.

231. See Notice of Proposed Rulemaking, *Computer III Remand Proceeding*, 5 F.C.C.R. 5242, 5242 (1990) (the FCC proposed "(1) to reinstate Open Network Architecture (ONA) obligations on the Bell Operating Companies (BOCs) and the American Telephone and Telegraph Company (AT&T); (2) to permit AT&T to provide collocated enhanced services on an integrated basis pursuant to the nonstructural safeguards adopted in *Computer III*; and (3) to reinstate certain *Computer III* decisions regarding Network Channel Terminating Equipment (NCTE)"); Report and Order, 5 F.C.C.R. 7719, 7719-20 (1990) (adopting the proposals contained in the NPRM).

232. Chairman Alfred C. Sikes, Statements in FCC Press Release 4 (July 9, 1990).

233. Killete, *supra* note 230, at 13. IBM, Lexis and Westlaw are just three examples of ESPs.

business and marketing strategies under which they can offer the services.²³⁴ Before the BOCs and ESPs can fully develop and implement these new business plans, however, they must wait for word from the different PUCs to see what new and different state regulations require their compliance. States that do not quickly issue new regulations will cause substantial delay in the deployment of new, innovative enhanced services.

Apart from increasing the cost of doing business for ESPs and developing a more burdensome preemption test for the FCC, *California v. FCC* renders twenty years of Commission rulemaking moot, jeopardizing the creation of a coherent, unified competitive enhanced services market.²³⁵ FCC Chairman Sikes fears that the decision will result in a " 'crazy quilt' of regulations," producing "[u]ndesirable geographic and customer inequities."²³⁶

By characterizing the FCC's distinction between enhanced and basic services as a "cramped reading,"²³⁷ the court in *California v. FCC* ignored the detailed rulemaking proceedings begun in 1968 with *Computer I*.²³⁸ Rather than examining the basis for the FCC's *Computer I* and *Computer II* technical and legal distinctions between enhanced and basic services,²³⁹ the Ninth Circuit simply adopted the petitioner's characterization of enhanced services as nothing more than electronic signals passing over a telephone wire.²⁴⁰ In fact, the court ignored the D.C. Circuit's lengthy and detailed opinion in *CCIA* which discussed and then affirmed the FCC's distinctions between basic and enhanced services.²⁴¹ The court also ignored the Fourth Circuit's decision in *NARUC I*²⁴² where that court held that a service's status as common or non-common carrier depended on how the service was provided, not on the identity of the provider.²⁴³ In fact, the Ninth Circuit's conclusion that section 152(b) distinguishes between providers of services²⁴⁴ stands in

234. The BOCs can continue offering enhanced services on an integrated basis under comparably efficient interconnection (CEI) plans filed prior to the Ninth Circuit's decision. Killete, *supra* note 229, at 2.

235. The United States Court of Appeals for the District of Columbia Circuit has held that when an agency replaces an existing rule with a new one, and a court vacates all or part of the new rule, the effect is to reinstate the rule previously in force. *Action on Smoking and Health v. Civil Aeronautics Bd.*, 713 F.2d 795 (D.C. Cir. 1983).

236. Chairman Alfred C. Sikes, Statements in FCC Press Release 5 (July 9, 1990).

237. *California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990).

238. *See supra* notes 9-21 and accompanying text.

239. *See supra* notes 4, 28-29 and accompanying text.

240. 905 F.2d at 1242.

241. 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *see supra* notes 31, 118 and accompanying text.

242. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

243. *See id.* at 640-42.

244. 905 F.2d at 1240.

marked contrast to the *NARUC I* opinion and the numerous FCC decisions incorporating its reasoning.

Fearing a reality like the one described by Chairman Sikes, ESPs filed a petition for declaratory ruling with the FCC, asking that the Commission declare that the states and the District of Columbia are preempted from imposing entry and exit regulation and tariff requirements on carrier affiliated and noncarrier affiliated enhanced service providers.²⁴⁵ The ESPs filed their petition in response to actions taken by the Florida,²⁴⁶ Delaware²⁴⁷ and District of Columbia²⁴⁸ public utility commissions to impose very different and limiting entry or exit regulations on both carrier and non-carrier ESPs.²⁴⁹ According to the ESPs, the regulations threaten the flourishing and competitive enhanced service market which developed under the FCC's control.²⁵⁰

245. See Petition for Declaratory Ruling That States and the District of Columbia Are Preempted From Imposing Entry and Exit Regulation and Tariff Requirements on Carrier Affiliated and Noncarrier Affiliated Enhanced Service Providers (FCC filed Feb. 11, 1991) [hereinafter D.C. Petition for Declaratory Ruling].

246. Florida Public Service Commission, An Investigation Into Statewide Offering of Access to the Local Network for the Purpose of Providing Information Services, Docket 880423-TP, Order No. 21815 (Sept. 5, 1989) [hereinafter Florida PSC Investigation].

247. Public Service Commission of the State of Delaware, The Application of the Diamond State Telephone Company for the Establishment of Regulations and Rates for Answer Call Service, PSC Docket No. 90-34T, Order No. 3215 (Nov. 2, 1990) [hereinafter Diamond Application].

248. Public Service Commission of the District of Columbia, Order to Show Cause, Formal Case No. 904, Investigation of Regulation of Enhanced Services, Order No. 9573 (Oct. 31, 1990) [hereinafter D.C. Show Cause Order].

249. See Public Notice for Petition for Declaratory Ruling, DA 91-223 (released Feb. 22, 1991). The D.C. Commission issued an Order to Show Cause on October 31, 1990, concluding that it would regulate the provision of enhanced services in the District of Columbia. See D.C. Show Cause Order, *supra* note 248. The D.C. Commission proposed to regulate services provided by carriers as well as services provided by independent ESPs. See D.C. Petition for Declaratory Ruling, *supra* note 245, at 10. The D.C. Show Cause Order concluded, *inter alia*, that the D.C. Public Utility Commission had jurisdiction over particular enhanced services even when they were offered over interstate lines as long as "intra-District traffic [was] transmitted." D.C. Show Cause Order, *supra* note 248, at 2.

The Florida Public Service Commission (PSC) issued an order in September in which it concluded that particular enhanced services offered by local exchange carriers and independent ESPs are public utility services subject to state tariff regulation. See Florida PSC Investigation, *supra* note 246. One of the most alarming portions of the *Florida PSC Investigation* is that the Commission expanded its definition of "intrastate" services to include services transmitted from an ESPs' point of presence in Florida to the point of termination/origination in Florida regardless of whether the service is being used to originate/terminate an interstate enhanced service. *Id.* at 27. The Delaware Public Service Commission issued an order November 2, 1990 allowing a tariff to become temporarily effective for a formerly unregulated enhanced service. See Diamond Application, *supra* note 247.

250. See D.C. Petition for Declaratory Ruling, *supra* note 245, at 9.

VII. CONCLUSION

Once again, the Commission's quest for a fully competitive telecommunication market has drawn the states and the FCC into a jurisdictional battle. This time, the tension has split the circuits, leaving all parties concerned with little guidance as to how to proceed. For several reasons, *California v. FCC* effectively increases the degree of difficulty inherent in the FCC's pursuit of a competitive telecommunication market. First, this decision does not defer to the Commission's rulemaking in *Computer I* and *Computer II*, as the Fourth Circuit did in *NCUC I* and *NCUC II* and as the D.C. Circuit did in *CCIA*. Unable to classify enhanced services as "non-common carrier offerings," the Commission must rework twenty years of rulemaking. In effect, this decision has placed the Commission in the same position it was in 1968, when it commenced *Computer I*, lacking effective control over common carrier entry into the data processing field so as to protect phone customers from increased rates and, at the same time, promote full and fair competition in a burgeoning industry. Second, the Ninth Circuit requires the FCC to make a specific showing that the state regulation necessarily thwarts the FCC, in every instance, from fulfilling its policies. This places a tremendous evidentiary burden on the Commission, one the FCC may have to fight long and hard to prove every time a state passes a prohibitive regulation. Third, because this decision interprets section 152(b) as a broad restriction on Commission authority to preempt state public utility regulation, the FCC now finds itself equipped with limited means to effectuate a tremendous task—developing a rapid and efficient nationwide telecommunication network. Perhaps the time has come for the Supreme Court to definitively set forth the scope of the FCC's jurisdiction.

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