Duquesne Law Review

Volume 45 | Number 4 Article 2

2007

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Recommended Citation
Jeffrey D. Van Volkenburg, *Asleep at the Switch: The Pennsylvania Public Utility Commission's Acceptance of the Telecommunications Act and the Resulting Elimination of State Court Review*, 45 Duq. L. Rev. 615 (2007).
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Asleep at the Switch: The Pennsylvania Public Utility Commission's Acceptance of the Telecommunications Act and the Resulting Elimination of State Court Review

*Jeffrey D. Van Volkenburg**

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* The author would like to thank the Honorable Dan Pellegrini of the Pennsylvania Commonwealth Court for providing an introduction to this subject matter and the opportunity to pursue research in the same.

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I. INTRODUCTION

This project attempts to examine the consequences of the implementation of the revised Telecommunications Act of 1996 (hereafter, "Telecommunications Act" or "Act") in Pennsylvania. Broadly stated, the revised Act was ambitious in its scope, as it provided the most extensive overhaul of the telecommunications industry in almost thirty years. The purpose of the revised Act was to promote deregulation of the telecommunications industry, and the results have provided opportunities for new telecommunication entities to thrive where monopolies previously dominated. While the revised Act provided positive developments for deregulation, a less talked about, but possibly more important development occurred simultaneously as a direct result of this piece of legislation.

The indirect result of the revised Act was the emergence of a new dispute in the battle that has been continuously waged since the founding of the United States and the adoption of the Federal Constitution. The 1996 Telecommunications Act proposed federal legislation that tested both state and federal courts in the latest determination of exactly how far Congress could proceed under the constitutionally-protected shield of cooperative federalism legislation. At the core of the controversy surrounding the Act were several provisions for federal court review of state administrative agency decisions. The rulings in the cases that followed have generally deprived states of judicial review of their state agency decisions, thereby opening a new chapter in the debate over where the

line of demarcation must be drawn between the federal government and the states.

It may be assumed that the federal government had the power to implement the 1996 Telecommunications Act under its Commerce Clause powers, however a more troubling question emerged about the power and role of state administrative agencies. The Telecommunications Act shed light on the issue of whether an administrative agency could accept a piece of federal legislation that contradicted express provisions of a state constitution and existing statutory law. If an administrative agency does hold such power, what is the power's source? Does the power to accept federal legislation that overrules express state constitutional and statutory provisions reside in the state legislature or state agencies?

In an effort to answer the questions posed, this article will examine the acceptance of the 1996 Telecommunications Act in Pennsylvania. Additionally, this article will address the court decisions that have culminated in the elimination of state court review of the Pennsylvania Public Utility Commission's decisions relating to the Telecommunications Act. This elimination of judicial oversight contradicted the long-held, statutorily granted practice of state court review of administrative agency decisions in Pennsylvania.

II. THE TELECOMMUNICATIONS ACT OF 1996

A. *The Purpose of the Telecommunications Act of 1996*

The Telecommunications Act of 1996[1] was passed by Congress as a set of amendments to the 1934 Communications Act that significantly altered the telecommunications industry through deregulation of the industry in an effort to increase competition. The United States Supreme Court opined that the purpose of the Telecommunication Act of 1996 (Act) was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2] Pennsylvania courts explained that, "the purpose of the 1996 Act was to eliminate the state-regulated monopolies of

1. Pub. L. No. 104-104, 110 Stat. 56 (1996).
2. *Id.*

local telecommunications markets in favor of a regulatory scheme that encourages a competition based market."[3]

The telecommunications industry has historically been dominated by large telecommunication providers, with a single provider as the only option for consumers within a state or locality. The essence of the revisions to the Telecommunications Act mandated that additional providers could enter a market using the existing telecommunications infrastructure of the dominant provider. The existing or dominant providers in a market were required by the Act to allow additional providers the use of their technology and technology infrastructure. The dominant providers were to be compensated for the use of their infrastructure. Consequently, additional providers were allowed to enter markets that had previously been unattainable due to the high costs associated with developing a new, separate telecommunications infrastructure and the reluctance of existing providers to allow new competitors to utilize their infrastructure.

B. *Specific Provisions of the 1996 Telecommunications Act*

The 1996 revisions to the Telecommunications Act did not completely destroy the statutory structure of the Act implemented in 1934, but rather added several sections and modified existing sections. Of specific importance were §§ 251, 252, and 253, which are at the heart of the bevy of litigation that emerged from the Act. An understanding of these sections is essential for the larger question of whether the acceptance of the Act was constitutional in Pennsylvania.

1. *Section 251 — Defining the Duties of Telecommunication Parties Under an Agreement*

The competition-based market that the Act strived to achieve was framed within § 251(b) of the Act, which required that a local exchange carrier (LEC) had an obligation to: (1) provide number portability to the extent technically feasible; (2) resell on nondiscriminatory terms; (3) provide dialing parity to competing providers to establish reciprocal compensation arrangements for the transport and termination of telecommunications; and (4) to afford access to rights of way.[4] This section of the Act states that a tele-

3. MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, 844 A.2d 1239, 1250 (Pa. 2004).
4. 47 U.S.C. § 251(b) (1996).

communications provider must allow other telecommunications providers to use their existing infrastructure, giving new companies the opportunity to enter into a market by using an existing telecommunication infrastructure. Additional duties were imposed on incumbent local exchange carriers (ILECs) who were defined as the telecommunications companies that historically held the dominant position within a locality. The duties of existing providers are described below:

> [T]hey must negotiate in good faith to create agreements necessary for fulfilling the [§ 251(b)] duties; they must provide for "requesting communications carriers" appropriate interconnections; they must provide unbundled access to network elements at any technically feasible point on just, reasonable and nondiscriminatory terms; they must offer to aspiring competitors at wholesale rates any services that they sell at retail; and they must give reasonable public notice of changes in their services that would affect others.[5]

Additionally, § 251(c)(2) required incumbent LECs to provide interconnection to any requesting telecommunications carrier in a manner that is technically feasible. Section 251(c)(3) required incumbent LECs to provide requesting telecommunications carriers nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory.[6]

Section 251(e)(1) codifies the involvement of the state commissions in opening up new markets for telecommunication providers by requiring that when an agreement is reached between an incumbent telecommunications provider and a new entrant, their agreement is to be submitted to the state utility commission for approval. The importance of this section cannot be understated, as it imposes a direct responsibility upon state agencies to implement federal legislation, thereby providing the genesis for the constitutionality issues that emerged from the Act. The competitive provisions of § 251 marked a significant deviation from past practices where the ILECs held a monopoly over local markets, thereby eliminating competition.

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5. MCG Commc'ns, Inc. v. BellSouth Telecomm., Inc., 146 F. Supp. 2d 1344, 1346 (2001).
6. *See* 47 U.S.C. § 251(c)(3).

2. *Section 252 — The Process for Dispute Resolution Between Telecommunication Providers Under the Act*

The drafters of the revised Act were cognizant that such a massive shakeup in the telecommunications industry would inevitably lead to litigation. The most important provisions of § 252 outline a process for resolving disputes that arise among telecommunication providers in the process of dispute resolution between ILECs and new competitors entering the market.

The resolution process begins after the incumbent telecommunications provider and the new potential provider have attempted to form a viable agreement under the Act. When disputes arise between the parties, the issue may be heard by the state commission charged with resolving disputes between telecommunication carriers. This entity is usually a state public utility commission.[7] The commission is charged with holding informal hearings while acting as a mediator to bring the parties together to form a viable contract.[8] The parties may negotiate and come to a resolution that must be approved by the state public utility commission (PUC) or public service commission.[9] In Pennsylvania, the PUC is charged with conducting these hearings.

When parties cannot reach an agreement, the state commissions hold formal hearings and issue a final solution that resolves the dispute between the parties. During this stage of the proceedings, the Act granted the Federal Communications Commission (FCC) intervention powers, which allows the FCC to assume jurisdiction over the dispute. The FCC takes the place of the state public utility commission if the state commission "fails to carry out its responsibilities."[10]

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7. 47 U.S.C. § 252(a)(2) provides, "any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation." 47 U.S.C. § 252(a)(2) (1996). *See also* 47 U.S.C. § 252(b)(1).

8. *See* 47 U.S.C. § 252(b)(1), (5).

9. *See* 47 U.S.C. § 252(e).

10. *Id.* § 252(e)(5). Section 252(e)(5) provides:

> If a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission (FCC) shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

Id.

When the state commission issues a binding decision on the parties, the findings of the commission may be appealed to the courts. Sections 252(e)(4) and 252(e)(6) provide guidance for appeals of commission decisions to the courts.

Section 252(e)(4) of the 1996 Telecommunications Act states that "[n]o State Court shall have jurisdiction to review the action of a State commission in *approving or rejecting* an agreement under this section."[11] Section 252(e)(6) provides that where a state commission makes a determination, an aggrieved party *may* bring an action in the appropriate federal district court in order to determine if the agreement meets the requirements of § 251.[12] These two sections are central to the controversy that engulfed the implementation of the Act on a state level.

The ensuing discussion of litigation involving the Act indicates that the interpretation of these two sections has been a flash point for litigation. At the core of the disputes has been whether § 252(e)(4) should be read broadly to allow state court review of suits that address issues other than the *approval or rejection* of interconnection agreements. Similarly, the issue that emerged from the wording of § 252(e)(6) was whether the use of the word "may" could be read to allow state court review of agency decisions in addition to the grant of federal court review that is presently allowed. Proponents for the allowance of state court review have argued that the drafters of § 252(e)(6) could have chosen to explicitly divest state courts of jurisdiction to hear all disputes. The substitution of the word "must" in place of "may" would have been sufficient to accomplish this goal.

III. PROCEDURE FOR STATE ACCEPTANCE OF THE TELECOMMUNICATIONS ACT

The nature of the Act's revisions required the use of cooperative federalism legislation. The 1996 Telecommunications Act was implemented in Pennsylvania with the FCC working directly in coordination with the Pennsylvania PUC. The FCC's three broad-based goals for the Act were:

> (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in the telecommunications markets that are already open to

11. *Id.* § 252(e)(4) (emphasis added).
12. *Id.* § 252(e)(4), (6) (emphasis added).

competition, including the long distance services market; and (3) reforming the system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition.[13]

In coordination with state utility commissions, the FCC attempted to construct a flexible strategy that "set[s] minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets."[14]

The FCC realized that there would need to be some degree of localized discretion in the creation of rules and regulations by acknowledging the contentions of those opposed to uniform national regulations. One opponent to explicit national standards, GTE, asserted:

> [i]n reality, each local market is different — some are flat, others are hilly or mountainous, some are densely populated, others are suburban, or rural; some have state-of-the-art technology, others retain older facilities; some possess a temperate climate, others suffer harsh storms; some are wealthy, others are poor; some have a high proportion of business customers, others are predominantly residential.[15]

The FCC agreed with these contentions in their formulation of the sphere of authority to be retained between the FCC and state commissions by finding that:

> The 1996 Act moves beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expands the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues. In the Report and Order, the Commission concludes that the states and the FCC can craft a partnership that is built on mutual commitment to local telephone competition throughout the country, and that under this partnership, the FCC establishes uniform national rules for some issues, the states, and in some instances the FCC, administer

13. 11 *FCC Rcd.* 15499, 15505.
14. *Id.* at 15512.
15. *Id.* at 15526.

these rules, and the states adopt additional rules that are critical to promoting local telephone competition.[16]

Although the FCC decided to implement a national standard for many provisions while still allowing state commissions to fill in gaps, the FCC did provide that the standards they set would not be unalterable. The FCC stated, "[w]e also believe that we should periodically review and amend our rules to take into account experiences of carriers and states, technological changes and market developments."[17] In support of the position that the FCC retained the power to implement provisions of the Act at both a state and federal level, the FCC believed that § 251 "authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements."[18]

Section 251(d)(1) of the Act instructed the FCC to establish regulations to implement the requirements of § 251 by August 8, 1996.[19] In coordination with § 251(d)(1), § 253 required the FCC to preempt the enforcement of any state or local statute, regulation, or legal requirement that "prohibit[ed] or [has] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[20] This marked the beginning of the implementation of the Telecommunications Act in Pennsylvania and the beginning of the court challenges that would result in significant curtailment of state court review, instead favoring federal legislation.

IV. THE FEDERAL COURTS DEFINE AND INTERPRET THE PROVISIONS FOR JUDICIAL REVIEW FROM APPEALS OF ADMINISTRATIVE AGENCIES ADDRESSING THE TELECOMMUNICATIONS ACT

The conflict of proper venue for disputes arising from telecommunication agreements has been heavily litigated in state courts, various federal circuit courts, as well as the United States Supreme Court since the inception of the 1996 Act. As the decisions indicate, the Pennsylvania Supreme Court's interpretation of § 252(e)(4) and (e)(6), denying state court review of PUC decisions,

16. *Id.* at 15513.
17. *Id.* at 15535.
18. 11 *FCC Rcd.* 15499, 15544.
19. 47 U.S.C. § 251(d)(1) (1996).
20. *See* 47 U.S.C. § 253 (1996).

was in accordance with a strong line of federal court precedent.[21] The decisions have proven to be problematic because of the willingness of the courts to focus on relevant issues from the federal constitutional perspective while largely ignoring state constitutional issues. The following review of federal court decisions addressing the implementation of the Act provides some insight into the framework within which the courts have addressed the conflict between the federal government's right to formulate this legislation and the resistance that emerged to the proposed changes.

A. Verizon Maryland, Inc. v. Public Service Commission of Maryland

Verizon Maryland, Inc. v. Public Service Commission of Maryland,[22] originated after Verizon Maryland, Inc., an incumbent local exchange carrier (ILEC), negotiated an interconnection agreement with a competitor later acquired by MCI WorldCom, Inc.[23] The Maryland Public Service Commission approved the agreement pursuant to the 1996 Act. Verizon subsequently refused to continue payment for reciprocal compensation for calls made by Verizon's customers to the local access numbers of Internet Service Providers (ISPs).

WorldCom filed a complaint with the Maryland Public Service Commission (hereafter, "Commission") in which the Commission found in WorldCom's favor.[24] The Commission ordered Verizon to make all past and future payments for ISP-bound calls. Verizon responded by filing an action in federal district court against the Commission, its individual members in their official capacities, WorldCom and other competing LECs.[25] Verizon cited § 252(e)(6) and 28 U.S.C. § 1331 as the basis for the federal court's jurisdiction.

The district court dismissed the action, which was affirmed by the Fourth Circuit on appeal.[26] After finding that the Commission did not waive its Eleventh Amendment immunity from suit, the Fourth Circuit Court further held that, under *Ex Parte Young*,[27] individual commissioners could not be sued in their official capaci-

21. *See* MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, 844 A.2d 1239 (Pa. 2004).
22. 535 U.S. 635 (2002).
23. *Verizon Md.*, 535 U.S. at 639.
24. *Id.* at 640.
25. *Id.*
26. *See* Bell Atlantic Md. v. MCI WorldCom, Inc., 240 F.3d 279 (4th Cir. 2001).
27. 209 U.S. 123, 166-68 (1908).

ties.[28] Additionally, the court held that neither § 252(e)(6) nor § 1331 provided a basis for jurisdiction over Verizon's claims against private defendants.[29]

The United States entered the fray as an intervenor and, along with Verizon, petitioned the United States Supreme Court for review of the four questions decided by the Fourth Circuit. The Court had previously granted certiorari in *Mathias v. WorldCom Technologies Inc.*,[30] which raised all issues present except for the question of whether § 1331 provided the basis for jurisdiction.[31] The Court allowed oral arguments on the sole issue of § 1331 jurisdiction in conjunction with *Mathias*.[32] The Court released both opinions on the same day while deciding the three questions presented in the *MCI* case.

The Court's analysis of this case began by framing the position of WorldCom, Verizon and the United States. Their asserted position was that 47 U.S.C. § 252(e)(6)[33] and 28 U.S.C. § 1331[34] "independently grant federal courts with subject-matter jurisdiction to determine whether the Commission's order requiring that Verizon pay WorldCom reciprocal compensation for ISP-bound calls violated the 1996 Act."[35] The Court next acknowledged that the determination at issue was neither an "approval nor rejection" of a statement of generally available terms, thereby taking it out of the specific language of § 252(e)(4). Verizon, WorldCom and the United States argued that a state commission's authority under § 252 implicitly encompassed the authority to interpret and enforce an interconnection agreement that the commission had approved. The petitioner asserted that the Commission's interpretation or enforcement decision was a "determination" under § 252(e)(6) sub-

28. *Verizon Md.*, 535 U.S. at 640.

29. *Id.* The underlying issue that brought the dispute to the Fourth Circuit was whether ISP-bound calls should be categorized as nonlocal for purposes of reciprocal compensation, absent a federal compensation mechanism for those calls. The state commission concluded that, as a matter of state contract law, WorldCom and Verizon had agreed to treat the ISP-bound calls as local traffic subject to reciprocal compensation. *Id.*

30. 532 U.S. 903 (2001).

31. *Mathias*, 532 U.S. at 903.

32. *Id.*

33. 47 U.S.C. § 252(e)(6) provides: "[i]n any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district Court to determine whether the agreement or statement meets the requirements of Section 251 of this title and this section."

34. 28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

35. *Verizon Md.*, 535 U.S. at 641.

ject to federal court review.[36] On this important issue the Court sidestepped making a definitive determination, holding:

> Whether the text of § 252(e)(6) can be so construed is a question we need not decide. For we agree with the parties' alternative contention, that even if § 252(e)(6) does not confer jurisdiction, it at least does not divest the district courts of their authority under 28 U.S.C § 1331 to review the Commission's order for compliance with federal law.[37]

The Court found that there was proper jurisdiction needed for the suit to proceed, but sidestepped the issue of a definitive scope of the jurisdiction granted by § 252(e)(6) of the Act, finding that § 252 could not be used as a limiting mechanism to deprive federal court review of issues that were outside the scope of an agreement or rejection.[38] The Court's position was that there was not any negative language depriving jurisdiction of disputes that were not agreements or rejections, therefore, § 1331 could be used as a basis for jurisdiction.[39] The Court's view of § 252 jurisdiction for federal court review was akin to a "conferral of a private right of action."[40]

The remainder of the opinion examined the ability of the petitioners to proceed against the state commissioners in their individual capacity, which is not essential for the issues addressed in this paper.

B. Puerto Rico Telephone Co. v. Telecommunications Regulatory Board of Puerto Rico

An early decision limiting federal court review under the Act emerged from Puerto Rico and demonstrated a position contrary to the majority of federal courts that heard this matter. The First Circuit Court addressed the issues of interpretation of § 252 of the Telecommunications Act, holding for a more limited review of federal courts in relation to the Telecommunications Act in *Puerto Rico Telephone Co. v. Telecommunications Regulatory Board of Puerto Rico*.[41] This case was heard by the First Circuit after a

36. *Id.* at 641-42.
37. *Id.* at 642.
38. *Id.* at 643.
39. *Id.*
40. *Verizon Md.*, 535 U.S. at 644.
41. 189 F.3d 1 (1st Cir. 1999).

telephone local exchange carrier (LEC) initiated an action against the Telecommunications Regulatory Board of Puerto Rico (TRB) and a cellular telecommunications services provider. The action was brought after the TRB resolved a dispute between an LEC and a provider under their interconnection agreement, requiring the LEC to make refunds to its customers for long distance rates that were charged without notice. The LEC asserted claims under both state law and the Act and for an alleged unconstitutional taking and procedural due process violations.[42]

Both the Board and the provider's motion to dismiss the claims was granted by the United States District Court of Puerto Rico, in an opinion by Jose Antonio Fuste.[43] The LEC's appeal was heard by Circuit Judge Lynch of the Court of Appeals, who held that the court lacked federal jurisdiction over the Board's order, which ruled that the local exchange carrier violated Puerto Rico law.[44] Additionally, the judge held that the provision of the Telecommunications Act that authorized the review of state commission actions by a federal court so long as the actions related to interconnection agreements did not provide federal courts with the authority to review the actions of state commissions for compliance with state law.[45] In examining the LEC's takings claim, the court held that the Board's order did not interfere with a protectable property right; furthermore, under the governing principles of due process, the LEC did not have a protectable property right in its contractual right to impose long-distance charges on customers calling the provider's customers.[46]

The decision from the First Circuit is notable for declining federal court review of actions of state commissions for compliance with state law. The First Circuit's interpretation differed from the spirit of the subsequent United States Supreme Court decision of *Verizon Maryland, Inc. v. Public Service Commission of Maryland*.[47] Early in its opinion, the First Circuit specifically stated:

> [W]e conclude that § 252(e)(6) does not provide the federal courts with jurisdiction over [Puerto Rico Telephone Company's] claims. That is because the challenged Board order

42. *P.R. Tel. Co.*, 189 F.3d at 6.
43. P.R. Tel. Co. v. Telecomms. Regulatory Bd. of P.R., 20 F. Supp. 2d 308 (D.P.R. 1998).
44. *P.R. Tel. Co.*, 189 F.3d at 310-11.
45. *Id.*
46. *Id.* at 19.
47. 535 U.S. 635 (2002).

> lacks a sufficient nexus with the parties' interconnection agreement to be a determination which is subject to review; also, the provision for federal judicial review does not authorize review of Board actions for compliance with Puerto Rico law.[48]

The primary issue before the First Circuit was whether a cause of action should be decided under § 252 of the Telecommunications Act or under article 1210 of the Puerto Rico Civil Code.[49] In the more fundamental sense, this dispute again had a foundation in whether the proper characterization of the claim was based on state law or the 1996 Act. Consequently, the proper venue of state or federal court came in question.

The court's holding found that the Petitioner's claim could not be brought under the Telecommunications Act, which, the Court rationalized, precluded adjudication within the federal courts.[50] The specific issue before the First Circuit, however, was not identical to issues presented to the other circuit courts. By substituting a claim that could have been made under the broader interpretation of the Telecommunications Act for a state law claim sounding in contract, the Court deprived the federal courts of jurisdiction in a matter that dealt with the Telecommunications Act.

The First Circuit Court parsed through the opinion by the federal district court in an attempt to illuminate the jurisdictional question of the scope of § 252(e)(6) of the Act.[51] The lower court held that, "a state commission to which an arbitrated interconnection agreement is submitted must approve or reject the agreement, and § 252(e)(6) allows for federal jurisdiction only for review of the state commission's decision in that context."[52] The lower court then concluded that it lacked jurisdiction because the Board's order was based purely on state law and was "not an approval or disapproval of the Agreement or a rule regarding the Agreement's conformity with 47 U.S.C. 251," whereas "[t]his court has subject matter jurisdiction under the Act only when a state

48. *P.R. Tel. Co.*, 189 F.3d at 4.

49. P.R. LAWS ANN. tit. 31 § 3375 states: "Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfillment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law." P.R. LAWS ANN. tit. 31 § 3375 (2004).

50. *P.R. Tel. Co.*, 189 F.3d at 4.

51. *See* 47 U.S.C. § 252(e)(6), *supra* note 33.

52. P.R. Tel. Co. v. Telecomms. Regulatory Bd. of P.R., 20 F. Supp. 2d 308, 310 (D.P.R. 1998).

regulator applies federal law in its acceptance or rejection of an interconnection agreement."[53]

The First Circuit attempted to differentiate between the present dispute before it and other decisions interpreting § 252 of the Telecommunications Act. It first addressed the nature of Puerto Rico Telephone Company's (PRTC's) claims, finding that § 252(e)(6) did not confer federal jurisdiction on grounds that that there was not an "approval or rejection" present, as required by § 252(e)(6).[54] The court next examined whether the dispute involved a "determination" under § 252, which the court declined to address on grounds that the issue was not ripe.

Another issue presented by the parties was not necessary for resolution of this case. The parties vigorously disagreed over whether § 252(e)(6) confers federal court jurisdiction over state commission "determinations" that are interpretations of, enforcements of, or refusals to enforce existing interconnection agreements. Among the parties, the Board contended that only its orders approving or rejecting agreements are subject to federal judicial review. Both the PRTC and the Board of Cellular Communications of Puerto Rico (CCPR), otherwise adverse, as well as amicus curiae MCI WorldCom, Inc., contend that federal judicial review is broader.

There is some support for the broader view. Several courts have held that interpretations and enforcements of agreements are implicitly covered by § 252 and are also covered by § 252(e)(6).[55] The court elected not decide this issue, instead they assumed, ar-

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53. *P.R. Tel. Co.*, 189 F.3d at 7 (citing *P.R. Tel. Co.*, 20 F. Supp. 2d at 311).

54. The court stated:

> Given the nature of PRTC's claims, § 252(e)(6) does not confer federal jurisdiction here. It is clear that this provision covers approvals or rejections by state commissions of interconnection agreements, but that is not what is involved here. It is less clear whether the provision also covers 'determination[s]' that are not approvals or rejections. Even if the Act permits federal judicial review of such determinations, there is no federal jurisdiction over this case. The portion of the Board's order as to which PRTC is aggrieved does not have a sufficient nexus to the interconnection agreement between PRTC and CCPR to be a 'determination' under § 252 and so to fall within the jurisdictional bounds of § 252(e)(6). Even assuming that there were an adequate nexus, PRTC's claims in the end amount to an assertion that the Board failed to comply with state law provisions. There is no federal jurisdiction over such claims.

Id. 9-10.

55. *See* Ill. Bell Tel. Co. v. WorldCom Techs., Inc., 179 F.3d 566, 569-71 (7th Cir. 1999); Iowa Util. Bd. v. FCC, 120 F.3d 753, 804 n.24 (8th Cir. 1997) (stating in dicta that "we believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)"), *aff'd in part and rev'd in part* on other grounds, AT&T Corp. v. Iowa Util. Bd., 525 U.S. 366 (1999).

guendo, in PRTC's favor that review under § 252(e)(6) is not limited to initial acceptances and rejections of agreements.[56]

The court agreed with the previous interpretations of various circuit courts that found a broad scope for § 252, while at the same time, the court implicitly limited the scope of review for § 252(e)(6) on other grounds.[57]

Beyond the issues of federal jurisdiction in cases in which a court would review an "approval or rejection" and where "determinations" were at issue, the First Circuit clarified when and how a federal court may exercise jurisdiction over a state commission's "interpretation" of a term in an agreement. In support of a broad interpretation of § 252, the court cited *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*[58]

Thus, the court was presented with the difficult task of attempting to define what the parties were asking the court to clarify. After clarifying the issue, the court was charged with utilizing unsettled precedent to decide whether federal jurisdiction existed. The court stated:

> The pertinent question here is whether the Board determination as to which PRTC is aggrieved has a sufficient nexus to the interconnection agreement between PRTC and CCPR to fall within the broad interpretation of § 252(e)(6) for which PRTC argues. Because the parties use the terms "interpretation" and "enforcement" almost exclusively, we review whether the Board's order can be placed in either of these two categories, although those terms are not talismanic and cannot be found anywhere relevant in § 252 itself. The order does not fit in either category.[59]

In this case, PRTC was "aggrieved" about the Board's decision to apply Puerto Rico law in order to relieve PRTC's customers of any

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56. *P.R. Tel. Co.*, 189 F.3d at 10.

57. In support of a limited scope of review for federal courts in relation to § 252(e)(6), the court cited GTE S., Inc. v. Morrison, 957 F. Supp. 800, 804 (E.D. Va. 1997); Citizens' Util. Ratepayer Bd. v. McKee, 946 F. Supp. 893, 895 (D. Kan. 1996) (stating that federal court jurisdiction under § 252(e)(6) is "not without limits" and that "the court may hear . . . only those actions in which an aggrieved party seeks a determination of whether the agreement between the interconnecting service provider and the local exchange carrier satisfies the requirements of sections 251 and 252"). *P.R. Tel. Co.*, 189 F.3d at 10-11.

58. 179 F.3d 566, 569-71 (7th Cir. 1999) (holding that a state commission's interpretation of the reciprocal agreement regarding calls to internet service providers violated federal law).

59. *P.R. Tel. Co.*, 189 F.3d at 11.

duty to pay "retroactive or surprise charges."[60] This decision, the court held, is not intended as an interpretation of the agreement.[61] Rather, the agreement merely defines the relationship between CCPR and PRTC, it does not address the existing relationship between PRTC and its customers or the issue of notification of charges.[62]

The court's consideration of the argument for federal jurisdiction under § 252(e)(6) found that the Board's order was not a "determination under § 252, because it was insufficiently linked to the parties' interconnection agreement."[63] The court also found that Congress could have expanded the scope of jurisdiction under the Act more broadly if it had so chosen. The Act, in the court's view, "did not choose to grant the federal courts jurisdiction over any state omission determination that merely relates to or has some effect on an interconnection agreement or on competition between the players in a local telecommunications market."[64]

The position held by the First Circuit amounted to a middle ground, as the court acknowledged in its opinion, which deprived federal judicial review of the issue. While recognizing the important role the federal courts would play in the interpretation of key provisions of the Act, the court also realized that the Act was a piece of cooperative federalism legislation. The need for state regulation and involvement was still retained, despite the comprehensive scheme enacted by Congress.

The two cases previously discussed provide some insight into the complexities faced by courts in disputes arising from the 1996 Act. The manner in which § 252(e)(4) and (e)(6) were left open to interpretation caused litigation to emerge, primarily in federal court. Naturally, the federal courts were reluctant to divest their own jurisdiction over these cases, as this would encourage the emergence of mixed precedent from the different decisions in state and federal courts.

There are a plethora of cases that address the same issues and sub-issues involving the Telecommunications Act. The following footnotes from the federal circuit courts found a broader scope for the Act's provisions. These overviews are not meant to constitute a definitive explanation of court rationale used throughout the

60. *Id.* at 11-12.
61. *Id.*
62. *Id.*
63. *Id.* at 13.
64. *P.R. Tel. Co.*, 189 F.3d at 13.

United States in response to the Act, but rather illustrate the disparate responses and disjointed judicial holdings that permeate this area of the law. Some of the important decisions from the federal courts include: *Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*,[65] *Southwestern Bell Telephone Co. v. Public*

65. 179 F.3d 566 (1999). This case originated when incumbent local exchange carriers initiated an action against the commissioners of the Illinois Commerce Commission (ICC) and competitors. The action challenged an ICC ruling that telephone connections to internet providers (ISPs) were local calls subject to reciprocal compensation provisions of parties' interconnection agreements. The United States District Court upheld the ICC decision. On appeal, the circuit court affirmed, finding that the court had jurisdiction related to commissioners despite absence of formal judgment against them. Additionally, the court held that the ICC decision was subject to review by federal courts, and the decision did not violate federal law. *Ill. Bell Tel. Co.*, 179 F.3d 566, 569-70.

Central to the Seventh Circuit's holding was the proper venue for appeals of commission decisions regarding the decisions and interpretations relating to the Telecommunications Act. The court further addressed the Commissioner's contention that the Act does not provide for federal court review of issues not addressing the specific acceptance or rejection of an interconnection agreement. *Id.* The pertinent language of § 252(e)(6) cited by the court states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in appropriate Federal district court to determine whether the *agreement* or statement meets the requirements of Section 251 and this section." 47 U.S.C. § 252 (1996) (emphasis added).

The Commissioners supported the position that § 252(e)(6) precluded review of a commission "order" by the federal courts. *Ill. Bell Tel. Co.*, 179 F.3d at 570-71. The Commissioners argued that the language of § 252(e)(6) allowed for reviews of "agreements" while the case before the court disputed an "order" by the commission and not an agreement between telecommunication parties. Speaking for the Seventh Circuit, Judge Evans stated:

> "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts." In addition, although the present case arises in a slightly different context, our decision in *MCI* explains the nature of our jurisdiction. We noted that subsection 252(e)(6) provides for judicial review of "state commission actions," not simply review of "interconnection agreements" and that subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court.

Ill. Bell Tel. Co., 179 F.3d at 570-71 (quoting Ill. Bell Tel. Co. v. WorldCom Techs., Inc., 157 F.3d 500, 501 (7th Cir. 1998)).

The Seventh Circuit further clarified their position citing the Supreme Court decision of *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). The Seventh Circuit referred to the Court's opinion, stating:

> Justice Scalia indicated that the Act was broad federal occupation of territory once belonging to the states and that in turning some "federal policymaking . . . over to state administrative agencies," Congress set out a scheme which "is decidedly novel." He continued, "saying that the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well," or, as he put it elsewhere, it is a "surpassing strange" setup.

Ill. Bell Tel. Co., 179 F.3d at 571 (citing *AT&T*, 525 U.S. at 379 n.6, 385 n.10).
The Supreme Court's holding in *AT&T v. Iowa Utilities Board*, did not specifically decide the issue of whether federal court review of state utility board decisions was exclusive.

Utility Commission,[66] and *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*[67]

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66. 208 F.3d 475 (2000). The Fifth Circuit addressed the Telecommunications Act of 1996 in *Southwestern Bell Telephone Company v. Public Utility Commission.* An incumbent LEC brought an action challenging a decision of the state PUC that modem calls made by LEC's customers to competitor's customers that were ISPs constituted local traffic and thus triggered LEC's reciprocal compensation obligations under the parties' interconnection agreements. *Sw. Bell Tel.*, 208 F.3d at 477-78. Within its opinion, the Fifth Circuit addressed the issue of whether the federal courts were vested with jurisdiction over claims that pertained to the Act that were based on state law. According to the court:

> A similar jurisdictional question asks whether subsection 252(e)(6) limited federal review of a state commission's actions with respect to an interconnection agreement to those commission decisions that concern only compliance with the requirements of sections 251 and 252 of the Act, and does not extend to review of a commission's actions implicating compliance with state law.

Id. at 479.

The Untied States District Court for the Western District of Texas upheld the PUC's decision, and the LEC appealed. The Fifth Circuit held on appeal that the PUC had jurisdiction to interpret and enforce interconnection agreements. *Id.* at 480. Additionally, the court held that the district court had the necessary jurisdiction to review PUC's interpretation and enforcement of agreements. *Id.* The court reviewed the federal issues de novo, but reviewed state law issues under the arbitrary and capricious standard. *Id.* at 482. Ultimately, the court held that modem calls made by customers of LEC to competitor's customers that were ISPs constituted local traffic that triggered LEC's reciprocal compensation obligations. *Sw. Bell Tel.*, 208 F.3d at 485. The court's opinion was divided into two sections. One section addressed jurisdictional issues and another addressed the substantive issue presented to the court. The court's holding on the jurisdictional issues are of importance for this paper. The court stated:

> We also hold that the district courts have jurisdiction to review such interpretation and enforcement decisions of the state commissions. We will not read section 252(e)(6) so narrowly as to limit its grant of federal district court jurisdiction to review decisions of state commissions only to those decisions that either approve or reject interconnection agreements. *We conclude that federal court jurisdiction extends to review of state commission rulings on complaints pertaining to interconnection agreements and that such jurisdiction is not restricted to mere approval or rejection of such agreements.*

Id. at 480 (citations omitted) (emphasis added).

As the previous passage indicates, the central issue of the jurisdictional problem faced by the court was whether a limited or expansive interpretation of § 252(e)(6) was correct. If read expansively, § 252(e)(6) would allow for issues other than "agreements" to come under the jurisdiction of the federal courts under § 252(e)(6). The court acknowledged that federal law was unclear whether state law issues were subject to review by the federal courts. The court cited the Seventh Circuit opinion in *Illinois Bell Telephone v. WorldCom*, stating that the court, "takes the position that in examining a state commission order, the court's task is 'not to determine whether [state commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." *Id.* at 481 (citing *Ill. Bell Tel.*, 179 F.3d at 571).

The Fifth Circuit further cited the Fourth and Ninth Circuits which espoused a more expansive view of federal jurisdiction. "These circuits would permit district courts to consider *de novo* whether the agreements are in compliance with the Act and the implementing regulations, but to review all other issues decided by a state commission under a more deferential standard, either arbitrary and capricious or substantial evidence." *See* U.S. W. Commc'ns v. MFS Intelenet, Inc., 193 F.3d 1112, 1117, 1124 n.15 (9th Cir. 1999) (considering de novo agreement's compliance with the Act and regulations, and considering "all other issues" under arbitrary and capricious standard); GTE S., Inc. v. Morrison, 199

F.3d 733, 745 (4th Cir. 1999) (reviewing de novo the state commission's interpretations of the Act and reviewing state commission fact finding under the substantial evidence standard). The Fifth Circuit agreed with this expansive view of federal jurisdiction, holding that de novo review was appropriate in the analysis of whether agreements comply with §§ 251 and 252, while reviewing "all other issues" under an arbitrary and capricious standard. *Sw. Bell Tel.*, 208 F.3d at 482.

67. 317 F.3d 1270 (2003). The Eleventh Circuit, in *BellSouth Telecommunications, Inc., v. MCImetro Access Transmission Services, Inc.*, 317 F.3d 1270 (2003), examined the Telecommunications Act through the prism of the *Chevron* Doctrine. *BellSouth Telecomm.*, 317 F.3d at 1277. In this instance, an ILEC sued competitor local exchange carriers (CLECs) and the state public service commission, seeking declaratory relief from administrative decisions requiring reciprocal compensation for calls made to ISPs. *Id.* at 1272-73. The United States District Court for the Northern District of Georgia denied relief and ILEC appealed. BellSouth Telecomm., Inc. v. MCImetro Access Transmission, 278 F.3d 1223 (11th Cir. 2002). The court of appeals initially reversed. On rehearing en banc, the court of appeals held that the authority granted to state public service commissions under the Federal Telecommunications Act (FTCA) to approve or reject interconnection agreements between telecommunications carriers included the authority to interpret and enforce agreements which had already been approved. *BellSouth Telecomm.*, 317 F.3d at 1278-79. The court further found that the district court had jurisdiction under a federal statute that conferred on it, "original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." *Id.* at 1278. This allowed the court to hear challenges to orders of the state public service commission interpreting interconnection agreements. *Id.*

The court analyzed the decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, which held that agency determinations are entitled to due deference if: "(1) the statute is silent or ambiguous with respect to the issue at hand and (2) the agency's answer is based on a permissible construction of the statute." *Id.* at 1278 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)). According to the *Chevron* Court, "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an administrator of an agency." *Chevron*, 467 U.S. at 844. While the *BellSouth* court acknowledged that an agency or commission had discretion in interpreting the Telecommunications Act, it extended a commission's power under the *Chevron* doctrine to include the ability for federal courts to review agency decisions, stating that:

> [T]he language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance and to subject their determination to challenges in the federal courts. Section 252(e)(6) gives federal courts jurisdiction to review "determinations" made by state commissions. In contrast, § 252(e)(4) abrogates state court jurisdiction "to review the action of a State commission in approving or rejecting an agreement under this section." The use of the word "determination" in § 252(e)(6) rather than a specific reference to the approval or rejection of agreements leads us to believe that Congress did not intend to limit state commissions' authority to the mere approval and rejection of agreements.

BellSouth Telecomm., 317 F.3d at 1277 (citations omitted).

The Eleventh Circuit's holding followed the other federal circuit courts in expanding the power of the federal courts with respect to the Telecommunications Act. The opinion relied heavily on the *Chevron* doctrine, implicitly validating review powers to the district courts through the explicit powers given to state commissions to interpret and review issues pertaining to the Telecommunications Act. The Eleventh Circuit interpreted the *Chevron* doctrine to include the federal courts' power to review administrative agency decisions using the language of the Telecommunication Act as the basis for the broad interpretation. *Id.* at 1278.

V. *MCI WORLDCOM, INC. V. PENNSYLVANIA PUBLIC UTILITY COMMISSION*

When Pennsylvania courts finally examined the issue of the proper scope of jurisdiction under the Telecommunications Act, there had already been a bevy of federal court decisions attempting to interpret § 252 of the Act. *MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*[68] originated as an arbitration proceeding before the PUC known as the "MFS III Proceeding."[69] The MFS III Proceeding allowed Verizon (then Bell Atlantic-Pennsylvania, Inc.) to file tarriffs or tarriff supplements that would contain the permanent unbundled network elements (UNE) rates for interconnection agreements between the telecommunication parties to the agreement, as set by the PUC. The purpose of the MFS III proceeding was to set permanent rates for the leasing of UNEs in Pennsylvania. The MFS III Final Order established rates which were incorporated into WorldCom's interconnection agreement with Verizon.[70]

Subsequently, WorldCom filed a complaint in the United States District Court for the Middle District of Pennsylvania on December 8, 1997, premised on § 252 of the 1996 Act.[71] The magistrate judge found that the UNE rates set in the MFS III proceeding were inconsistent with the FCC's binding regulations and were unlawful.[72] The middle district's Honorable Sylvia H. Rambo adopted the report issued by the magistrate court. While the middle district formally ruled on the issue of the UNE rates, it remanded the issue of UNE pricing decisions to the PUC in consideration of the FCC's binding pricing regulations.[73]

The PUC subsequently initiated a broad review of Verizon's terms for providing access to its network and its UNE rates in July 1998. In an effort to resolve the above-mentioned issues as well as additional unsettled issues concerning local telephone competition, the PUC initiated a global settlement conference.[74] The result of the global settlement conference was the submission of two competing joint settlement petitions that proposed resolu-

68. 844 A.2d 1239 (Pa. 2004).

69. *See* Final Opinion and Order, *Application of MFS Intelnet of Pa., Inc.*, PUC Docket No. A-310203F0002 (Aug. 7, 1997) (hereafter, "MFS III Final Order"). *See also MCI WorldCom*, 844 A.2d at 1243.

70. *MCI WorldCom*, 844 A.2d at 1244.

71. Additional parties to the law suit included AT&T, Verizon and the PUC. *Id.*

72. *Id.*

73. *See* Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 273 F.3d 337 (3rd Cir. 2001).

74. *MCI WorldCom*, 844 A.2d at 1244.

tions of the pending issues. The opposing petitions were respectively submitted by a group led by Verizon and a second group led by WorldCom.[75] The PUC terminated the settlement conference by an order dated April 2, 1999, and consolidated the respective petitions for a contested hearing on the merits. The resulting ruling encompassed a 283-page Global Order on all outstanding issues.[76]

Several parties, including WorldCom, AT&T and Verizon, appealed the Global Order to the Pennsylvania Commonwealth Court. At the same time, Verizon appealed the Global Order to the United States District Court for the Eastern District of Pennsylvania, raising the same issues that were before the Pennsylvania Commonwealth Court.[77] WorldCom and AT&T filed cross-claims challenging the Global Order in Verizon's federal action.[78] The federal district court denied the proposed motion submitted by the PUC, asking it to abstain in favor of the commonwealth court's review.[79] The en banc decision of the commonwealth court was issued on October 25, 2000.[80] The decision affirmed the Global Order with respect to all appeals before it.[81]

After the decision of the commonwealth court, the Pennsylvania Supreme Court granted allocatur to address previous decisions by the United States District Court for the Middle District of Pennsylvania and the United States Third Circuit Court of Appeals.[82] The issue before the Pennsylvania Supreme Court was whether the cost model relied upon by the PUC to set UNE rates should be given preclusive effect.[83] Oral arguments were conducted on October 21, 2002, with the court directing the parties to supply supplemental briefing on the issue of whether the 1996 Act contemplated exclusive federal jurisdiction to review appeals arising un-

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75. *Id.* The settlement propositions were intended to be accepted or rejected in their entirety. *Id.*

76. *Id.*

77. *Id.* The opinion by the Pennsylvania Supreme Court stated that at the time Verizon appealed the PUC decision to the district court, it also appealed directly to the Pennsylvania Supreme Court, per the court's King's Bench powers. The court denied Verizon's King Bench application on June 2, 2000. *Id.*

78. *Id.* at 1245.

79. *MCI WorldCom*, 844 A.2d at 1245.

80. Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 763 A.2d 440 (Pa. Commw. Ct. 2000).

81. *Bell Atl.-Pa.*, 763 A.2d at 513. The commonwealth court denied reargument on January 8, 2001. Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 788 A.2d 378 (Pa. Commw. Ct. 2001).

82. Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 793 A.2d 911 (Pa. 2001).

83. *MCI WorldCom*, 844 A.2d at 1242-43.

der it, or whether concurrent state/federal subject-matter jurisdiction exists over any such appeal.[84]

The Honorable Marvin Katz of the United States District Court for the Eastern District of Pennsylvania heard the appeal from the Global Order in federal court.[85] The court found that federal district courts have exclusive jurisdiction over appeals arising from determinations by state commissioners regarding interconnection agreements under the 1996 Act.[86] Additionally, the court held that § 252(e)(4) was constitutional because Congress acted within the scope of its Commerce Clause power.[87] On December 16, 2003, the PUC promptly filed a post-submission communication under Pa.R.A.P. 2501(b) with the Pennsylvania Supreme Court, which included a copy of the opinion and order entered by Judge Katz.[88] WorldCom subsequently filed an application to present post-argument submission, requesting leave to present the court with the opinion and order entered by Judge Katz. Each of the respective submissions was accepted by the Pennsylvania Supreme Court.[89]

In its brief, WorldCom argued that § 252(e)(4) precluded state court review of the matter.[90] WorldCom also averred that § 252(e)(6) of the Act directed that state commission determinations could be appealed to an appropriate federal district court in order to determine if the agreement met the requirements of § 251.[91] The effect of these provisions, in WorldCom's view, required legal challenges to a state commission's approval of terms for interconnection agreements to be heard exclusively in the federal court. In support of this proposition, WorldCom referred to the United

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84. *Id.* at 1246.

85. *Id.* at 1239. On December 12, 2003, the federal district court denied the PUC's motion for summary judgment. *Id.* at 1245.

86. *Id.*

87. *Id.*

88. *MCI WorldCom*, 844 A.2d at 1245. Pa.R.A.P. 2501(b) states:

> Change in status of authorities. If any case or other authority relied upon in the brief of a party is expressly reversed, modified, overruled or otherwise affected so as to materially affect its status as an authoritative statement of the law for which originally cited in the jurisdiction in which it was decided, enacted or promulgated, any counsel having knowledge thereof shall file a letter, which shall not contain any argument, transmitting a copy of the slip opinion or other document wherein the authority relied upon was affected.

Pa.R.A.P. 2501(b) (2005).

89. *MCI WorldCom*, 844 A.2d at 1245.

90. Brief of Appellant at 27, MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, No. 2916C.D. 1999 (Pa. 2004).

91. *MCI WorldCom*, 844 A.2d at 1246.

States Supreme Court decision in *Verizon Maryland, Inc. v. Public Service Commission of Maryland.*[92]

The PUC argued for a limited interpretation of § 252(e)(4) of the 1996 Act. The PUC's position was that the Act only prohibited state court review in the narrowly tailored instance of "approving or rejecting an agreement."[93] The PUC also proposed, in the case before the court, that the Global Order did not specifically approve or reject an agreement between an ILEC and a potential competitor.[94] Verizon, in the role of an intervenor, sided with the PUC.

The court acknowledged that the "general order in the Global case did not specifically approve or reject an interconnection agreement, but merely required Verizon to change the rates it offered to all of its competitors, including WorldCom."[95] This gave credence to the PUC's position that jurisdiction over an appeal of the PUC's UNE rate decision was properly vested in the commonwealth court under 42 Pa.C.S. 763(a)(1).[96]

In a footnote of the opinion, the court expounded on one of Verizon's main arguments, that when the court is determining whether state court jurisdiction exists over a federal claim, there should be a presumption that favors concurrent state court jurisdiction.[97] This presumption can only be overcome by a specific directive of Congress showing that exclusive federal jurisdiction was intended.[98] Verizon took the viable position that Congress did not specifically limit its exclusion of state court review to orders approving or rejecting interconnection agreements. Concurrent

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92. 535 U.S. 635 (2002).

93. *See* 47 U.S.C. § 252(e)(4) (1996).

94. *See* Supplemental Brief at 11, MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, No. 2916C.D. 1999 (Pa. 2004) (citing Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 107 F. Supp. 2d 653, 665 (E.D. Pa. 2001)).

95. *MCI WorldCom*, 844 A.2d at 1246.

96. 42 Pa.C.S. 763(a)(1):

> **General rule.**--Except as provided in subsection (c), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:
> (1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of Title 2 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Board of Claims, the Environmental Hearing Board, the Pennsylvania Public Utility Commission, the Unemployment Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction.

42 Pa.C.S. 763(a)(1) (2004).

97. *MCI WorldCom*, 844 A.2d at 1246 n.4.

98. *Id.* at 1246.

state and federal court jurisdiction would therefore be appropriate.[99]

The court, however, found that there was no merit in this argument by Verizon. Instead, the court cited the United States Supreme Court decision in *Tafflin v. Levitt*,[100] where the Court held that concurrent jurisdiction could be rebutted in three ways: (1) by explicit statutory directive; (2) through an unmistakable implication from the statute's legislative history; or (3) by a clear incompatibility between federal and state court jurisdiction.[101] The Pennsylvania Supreme Court acquiesced to *Tafflin's* holding in finding that Congress made an explicit statutory directive divesting state courts of jurisdiction to review state commission determinations in interconnection agreements.[102]

The next section of the opinion reviewed the process for establishing interconnection agreements, citing § 252(e)(4) and (e)(6) of the Act. The court dismissed the suggestion of concurrent jurisdiction between federal and state courts, citing only the language of the pertinent sections of the Act to support their holding.[103] The court next resolved the troubling question of whether state court jurisdiction for review of other claims arising under the 1996 Act was proper.[104] Verizon and the PUC reiterated their assertion for a more limited federal court jurisdiction encompassing only approval and rejection of agreements under § 252(e)(4).[105] The Pennsylvania Supreme Court negated this argument by referencing the litany of federal court cases which held for a robust federal jurisdiction.[106]

Finally, the court addressed the issue of whether there could be concurrent federal and state court jurisdiction. The PUC argued that exclusive federal court jurisdiction is limited because § 252(e)(6) merely states that an aggrieved party "may" bring an action in an appropriate federal district court, but it does not state that federal district courts have exclusive jurisdiction in all cases

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99. *Id.*

100. 493 U.S. 455 (1990).

101. *Tafflin*, 493 U.S. at 459-60. The three ways of rebutting concurrent jurisdiction were also utilized by *Bell Atlantic Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*. Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n, 295 F. Supp. 2d 529, 536 (E.D. Pa. 2003).

102. *MCI WorldCom*, 844 A.2d at 1247.

103. *Id.*

104. *Id.* at 1249.

105. *Id.* at 1247.

106. *Id.* at 1248.

where a state commission makes a determination.[107] The PUC concluded that there was no clear pre-emption of Pennsylvania laws requiring commonwealth court review of PUC final orders.[108]

The court's resolution of the issue relied exclusively on previous federal authority. The court's opinion did not acknowledge that the federal precedent was not binding on the Pennsylvania court. In the alternative, the PUC argued that the prohibition of state court review under § 252(e)(4) and (e)(6) was unconstitutional.[109] Passed under Congress's Commerce Clause powers, the PUC attempted to assert that this was an abrogation of Pennsylvania's sovereignty through the elimination of state court review of state administrative agency decisions.[110] To further this position, the PUC argued that § 252(e)(4) was unconstitutional because its prohibition of state court review was neither necessary nor proper to achieve the overarching congressional goal of developing competitive local telephone markets.[111]

Further supporting the PUC's position was its reliance on the Tenth Amendment by arguing that § 252 was not proper because it interfered with a state's sovereignty through the elimination of state supervisory powers over a state administrative agency.[112] The PUC's argument, simply stated, was that the Act deprived Pennsylvania courts of review that was legislatively mandated and constitutionally protected.

WorldCom's response to this argument was that because local telephone networks substantially affect interstate commerce and regulation of the network falls within Congress's Commerce Clause powers, it has the authority to do all that is necessary and proper for carrying out that power, including preempting state laws.[113] WorldCom thus concluded that because Congress had the power to preempt state law, preemption of state judicial review, in certain instances, is within Congress's constitutional reach under the Commerce Clause. Pennsylvania's highest court punted on the issue, holding that:

> Even if we were to assume that the PUC's constitutional objection had merit, that would not vest jurisdiction where the

107. *MCI WorldCom*, 844 A.2d at 1247.
108. *Id.* at 1249.
109. *Id.*
110. *Id.*
111. *Id.*
112. *MCI WorldCom*, 844 A.2d at 1249.
113. *Id.*

> 1996 Act prohibited it. The proper forum for this constitutional argument is in federal court. Without jurisdiction the court cannot proceed at all in any cause. . . . The "cannon of constitutional avoidance" provides that when a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.[114]

Relying on the above mentioned theory, the court held that "[t]here is no merit in the claim that the statute is unconstitutional if review is exclusively federal."[115]

After citing the "canon of constitutional avoidance" the court referred to *Federal Energy Regulatory Commission (F.E.R.C.) v. Mississippi.*[116] This decision by the United States Supreme Court held that "the commerce power permits Congress to preempt the States entirely in the regulation of private utilities."[117] The *MCI WorldCom* court continued the attempt to validate its reliance on the Commerce Clause by explaining the Necessary and Proper Clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into the Execution the foregoing powers. . . ."[118] These powers are limited, in that legislation can only be invalidated if "it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[119] The *MCI WorldCom* court concluded this section of their opinion by finding that "the PUC's argument that Section 252's exclusion of state court review is not necessary or proper is not persuasive."[120]

The court next switched gears to address the issue of whether the Tenth Amendment would prohibit Pennsylvania from administering this program against its will. The court correctly pointed out that the Tenth Amendment "does not prohibit Congress from offering states the choice of either 'regulating [an] activity according to federal standards or having state law pre-empted by federal

114. Harris v. United States, 536 U.S. 545, 555 (2002) (quoting U.S. *ex rel.* Attorney Gen. v. Del. Hudson Co., 213 U.S. 366, 408 (1909)).
115. *MCI WorldCom*, 844 A.2d at 1250.
116. 456 U.S 742 (1982).
117. *MCI WorldCom*, 844 A.2d at 1250 (quoting *FERC*, 456 U.S. at 764).
118. U.S. CONST. art. I, § 8, cl. 18.
119. *FERC*, 456 U.S. at 754 (quoting Hodel v. Indiana, 452 U.S. 314, 323-24 (1981)).
120. *MCI WorldCom*, 844 A.2d at 1250.

legislation.'"[121] The basic premise described by the court is that Congress may allow the states to either regulate in a particular field or not participate at all, in which case the federal government may take over the entire field. As long as the state is given the choice as to whether it desires to regulate or have the federal government preempt the entire field, it does not violate the Tenth Amendment.[122]

On close examination, the court's resolution in *MCI WorldCom* prompted the emergence of a problematic issue. Section 252 of the Act, cited by the court, addresses the responsibilities of state administrative agencies to (1) carry out its duties under the 1996 Act by "mediating, arbitrating, approving or rejecting interconnection agreements in accord with federal standards;" or (2) provide the FCC with the authority to assume such responsibilities.[123] Under these provisions the court stated that, "[a]ny action on the part *of the state or the state commission* is therefore voluntary for Tenth Amendment purposes; the federal government is not compelling the states to act."[124] This analysis is problematic from the standpoint of the power retained by an administrative agency. The Pennsylvania PUC is granted its powers by the federal government, which can then be used to deprive state courts of overview responsibilities. The PUC therefore acts as an agent of the federal government to deprive a state of its powers.

The court ultimately held that federal courts retained the exclusive jurisdiction to review state commission actions under the 1996 Act.[125] Congress had authority, according to the court, to enact § 252 and prohibit state court review of interconnection agreements under the Commerce Clause; such actions by Congress did not exceed its authority under the Commerce Clause, nor the Tenth Amendment.[126] The commonwealth court's order affirming the PUC's order was vacated.

The court's holding appears sound, with its reliance on the Commerce Clause powers to uphold the Act. The Commerce Clause provides an almost infallible shield to federal legislation. There could be an issue raised as to the characterization of the issue utilized by the court. Specifically, there is a strong argu-

121. New York v. United States, 505 U.S. 144, 167 (1992) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc. 452 U.S. 264, 288 (1981)).
122. *See Hodel*, 452 U.S. at 288.
123. *MCI WorldCom*, 844 A.2d at 1251. *See also* 47 U.S.C. § 252(e)(5) (1996).
124. *MCI WorldCom*, 844 A.2d at 1251.
125. *Id. See also* 47 U.S.C. § 252.
126. *MCI WorldCom*, 844 A.2d at 1251. *See also* 47 U.S.C. § 252.

ment that the court may have oversimplified the issue through reliance on the Commerce Clause. The issue could have been framed not as a Commerce Clause issue, but rather an undercutting of state constitutional authority.

If this were a dispute in federal court, there is a strong presumption that the federal court could have found that the Commerce Clause trumps any state challenges that might prohibit the scaling back of a federal program. However, this case was brought not as a challenge to the program's overall validity, but rather to ascertain whether state courts retained jurisdiction to hear disputes that arose in state agencies. It was essentially a state challenge to the interpretation given to a federal statute, not a challenge to the validity of the Act. The underlying issue not discussed in the opinion was whether state agencies or the state legislature retain the power to accept federal legislation, thereby depriving state courts of a statutorily granted power to hear the disputes.

This alternative analysis presents an issue that is exclusively state oriented, with no foundation in the federal program. A deeper reading of the case further reveals that the Pennsylvania Supreme Court wanted no part of looking internally at the overview mechanisms that were negligently or intentionally disregarded to push the Act through Pennsylvania.

The remainder of this article will examine the procedural safeguards that should have been examined and will clearly demonstrate that the Pennsylvania Supreme Court ignored the state's legislative mandates as well as its own past decisions. The court essentially relied on federal law to craft its opinion without even considering state law.

VI. FEDERAL GOVERNMENT POWER TO IMPLEMENT PROVISIONS OF THE TELECOMMUNICATIONS ACT

The following is a brief overview of the federal constitutional analysis that should be considered in instances where the federal government attempts to strip powers reserved for the states. While it may be presupposed that the federal government retained the power to implement the revised Act, it must also be remembered that recent Supreme Court decisions have established outer limits on the power of the federal government in this area.

The courts have examined the process that Congress undertakes when attempting to implement legislation that may conflict with state interests and the federalist framework of our country. If

Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so "unmistakably clear in the language of the statute."[127]

The Congressional purpose behind the Telecommunications Act was to provide a uniform piece of legislation that would further deregulation of the telecommunications market while increasing competition. The provisions of the Act requiring federal court review of all administrative agency actions were created with the purpose of providing a uniform system for appeals in order to avoid the varied outcomes of the Act that may have emerged with state court review of this piece of federal legislation.

Congress's rationale for including § 252(e)(4) and (e)(6) in the Act are fairly obvious in relation to the uniform implementation of the Act; however, it must be acknowledged that any attempt by Congress to provide for a uniform remedy is proper, but the Constitutional framework and guidelines must take precedent.[128] Deprivation of state review mechanisms for administrative agencies cannot be included in proper constitutional design. The implementation of the Telecommunications Act in Pennsylvania and the subsequent decision in the *MCI* case has deprived Pennsylvania courts of the ability to review decisions of the Pennsylvania PUC, a state agency, thereby violating the Pennsylvania Constitution.

Congress passed the Telecommunications Act pursuant to its powers under the Commerce Clause.[129] Congress's Commerce Clause power is broad, but not without limitation.[130] Recent decisions addressing Congress's power under the Commerce Clause have begun to limit the scope of that power, but within the scope of its decisions related to the Telecommunications Act, Congress's actions would likely be a valid exercise of its power.[131]

The discussion of congressional ability to implement the Act must include the Tenth Amendment limitations on the power of

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127. Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 787 (2000).

128. Fla. Prepaid Postsecondary Ed. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647-48 (1999).

129. U.S. CONST. art I, § 8, cl. 3.

130. *Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. at 666, 672. "[T]he power to regulate Commerce does not automatically provide Congress with the authority to violate state sovereign immunity." *Id.*

131. *See* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

the federal government.[132] The United States Supreme Court has found that the Tenth Amendment dictates that Congress may not exercise power in a fashion that impairs states' integrity or their ability to function effectively in a federal system.[133] In *Garcia v. San Antonio Metropolitan Transit Authority*,[134] the Supreme Court articulated the Tenth Amendment power by finding that the Court should not be the primary arbitrator in deciding whether Congress had acted in accordance with Tenth Amendment principles under the Commerce Clause.

The Court found that the structure of the federal government granted the necessary procedural safeguards to protect the sovereignty of states.[135] Under the principles discussed by the Court in *Garcia*, the Telecommunications Act was likely a valid exercise of Congressional power on grounds that Congress retains discretion to implement legislation under the auspices of the Commerce Clause, regardless of the level of impairment to the states. A primary consideration in upholding the 1996 Act was the ability of the states to accept a role in the implementation of the legislation. It is acknowledged that Pennsylvania voluntarily accepted the Act, hence the action by the federal government is proper.

Arguments could be raised under the doctrines announced in *New York v. United States*[136] and *Printz v. United States*,[137] that Congress may have overstepped its bounds in implementing the provisions of the Telecommunications Act that require state agency decisions be appealed to the federal courts. A proponent of these two landmark cases would assert that federal court review mechanisms were a coercive federal force in an area once reserved for state control.

The inability to regulate its own administrative agencies put Pennsylvania in the uncomfortable position of having a legislatively created body that is immune to the review mechanisms of the state. Most would acknowledge that this constitutes a serious infringement on its sovereignty. Congressional ability to interfere

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132. The Tenth Amendment provides, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." U.S. CONST. amend. X.

133. *See* United States v. Fry, 421 U.S. 542, 547 (1975), for the general proposition that the Commerce Clause permits Congress to regulate in almost any area, regardless of the individual impact on interstate commerce, as long as whatever is being regulated somehow affects interstate commerce.

134. 469 U.S. 528 (1985).

135. *Garcia*, 469 U.S. at 528.

136. 505 U.S. 144, 156 (1992).

137. 521 U.S. 898 (1997).

with a state's sovereignty is not an absolute power. It must be remembered, "no interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature."[138] While the Act itself may be a valid exercise of power, the review mechanisms within the Act may exceed congressional authority. The Telecommunications Act deprived state court review of administrative agency decisions on grounds that the federal courts would be better equipped to provide a uniform review process for a policy that was implemented in all fifty states. This argument has lost significance, as it has been well settled that state courts may apply federal law.[139] In *New York v. United States,* the Supreme Court described the proper analysis for such situations:

> In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[140]

While the federal government may have power to overrule conflicting state provisions, state court review of its own administrative agency decisions denies the state an inherent right. The precedent set from these decisions does not mandate that all federal legislation implemented at the state level is in accordance with Tenth Amendment principles. The implementation of the Telecommunications Act revealed marked differences between the issue of state court review of administrative agency decisions and prior Supreme Court holdings.

Reno v. Condon[141] came before the United States Supreme Court after South Carolina brought an action against the United States challenging the constitutionality of the Driver's Privacy Protection Act (DPPA).[142] The DPPA essentially restricts a state's

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138. License Tax Cases, 72 U.S. 462, 471 (1866).
139. *See Printz*, 521 U.S. 898 (holding that a "[s]tate court cannot refuse to apply federal law.").
140. *New York*, 505 U.S. at 156.
141. 528 U.S. 141 (2000).
142. *Condon*, 528 U.S. at 143.

ability to disclose a driver's personal information without the driver's consent.[143] The United States District Court for the District of South Carolina granted summary judgment to the plaintiffs and the Fourth Circuit Court of Appeals affirmed.[144]

The United States filed a petition for certiorari that was granted by the Supreme Court. Speaking for the Supreme Court, Chief Justice Rehniquist held that the DPPA was a proper exercise of congressional authority to regulate interstate commerce under the Commerce Clause, and that the DPPA did not violate the principles of federalism contained in the Tenth Amendment.[145]

In distinguishing the *Condon* opinion from the case law disputing the Telecommunications Act, the distinction is clear — the DPPA was a piece of federal legislation that did not require any degree of intrusive action by the federal government into the realm of state actions and rights. The DPPA legislation merely prevented states from selling the personal information of its citizens to companies, but did not affect a state's abilities to regulate its own activities or maintain control over state agencies. In contrast, the Telecommunications Act has taken power *away* from Pennsylvania courts to adjudicate issues arising from the actions of Pennsylvania state agencies, and therefore has directly infringed on Pennsylvania's sovereignty in a manner the DPPA legislation did not require.

Speaking for the Court in *Reno,* Chief Justice Rehnquist added:

> The DPPA does not require the States in their sovereign capacity to regulate their own citizens. . . . It does not require the South Carolina Legislature to enact any laws or regulations [as did the statute at issue in *New York v. United States*[146]], and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals [as did the law considered in *Printz v. United States*[147]].[148]

Alternatively, the Telecommunications Act requires state officials to assist in both the enforcement of federal statutes and the regulation of private companies and organizations, thereby distin-

143. *Id.* at 144.
144. *Id.* at 147. *See also* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998); Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997).
145. *Condon*, 528 U.S. at 148-49.
146. 505 U.S. 144 (1992).
147. 521 U.S. 898 (1997).
148. *Condon*, 528 U.S. at 151.

guishing the DPPA legislation from the Telecommunications Act. The Telecommunications Act also requires the Pennsylvania Legislature to address the conflict between its state statutory provisions requiring state court review of administrative agency actions and the opposing view, which would mandate federal court review of administrative agency actions. Additionally, the Telecommunication Act requires sovereign states to regulate the activity of companies and corporations conducting business within the state.

The issue of the constitutional balance of power was also addressed in *Federal Energy Regulatory Commission (WORLDCOM) v. Mississippi*.[149] The State of Mississippi Public Service Commission argued that Titles I and III and section 210 of Title II of Public Utility Regulatory Policies Act (PURPA) were unconstitutional under the Commerce Clause and the Tenth Amendment.[150] The district court found the challenged provisions void, and the Federal Energy Regulatory Commission appealed.[151] Ultimately, the Supreme Court held that the challenged provisions did not violate the Commerce Clause, but that the Tenth Amendment was violated by the requirement that a state enforce standards promulgated by FERC, coupled with directives that states consider specified rate-making standards.[152]

The Court addressed two primary issues within its opinion. The first was the validity of the legislation in the face of an attack alleging that provisions of the legislation exceeded Commerce Clause powers. The second primary issue addressed the possibility of a Tenth Amendment violation.

Justice Blackmun spoke for the Court and referred to the district court, which held in an unreported opinion that, "[t]here is literally nothing in the Commerce Clause of the Constitution which authorizes or justifies the federal government taking over the regulation and control of public utilities. These public utilities were actually unknown at the writing of the Constitution."[153] The lower court relied on *National League of Cities v. Usery*[154] in holding that the statutory provisions of the PURPA "constitute a direct

149. 456 U.S. 742 (1982).
150. *FERC*, 456 U.S. at 742.
151. *Id.*
152. *Id.* at 742-43.
153. *Id.* at 752-53.
154. 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit. Auth., 469 U.S. 528 (1985).

intrusion on integral and traditional functions of the State of Mississippi."[155]

The Supreme Court countered this argument through its reliance on *Gibbons v. Ogden*,[156] stating, "[j]udicial review in this area is influenced above all by the fact that the Commerce Clause is a grant of plenary authority to Congress. . . . This power is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the [C]onstitution.'"[157]

The Court further clarified its view for an expansive interpretation of the Commerce Clause. "It is established beyond peradventure that 'legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality . . . .'"[158]

The holdings cited by the Court lead to the conclusion that the commerce powers retained by Congress are broad. Further reinforcing this idea, the Court stated, "[t]his is not to say the Congress can regulate in an area that is only tangentially related to interstate commerce."[159]

In *FERC*, the plaintiff's claim that the Tenth Amendment had been violated presented constitutional issues similar to those raised by the implementation of the Telecommunications Act in Pennsylvania.

While the Commerce Clause question had already been addressed previously by the Court, the Tenth Amendment issue presented in this case was "somewhat novel" for the Court.[160] The Court pointed out what it considered to be an obvious relationship between this case and *National League of Cities v. Usery*,[161] insofar as both cases required the Court to address principles of state sovereignty.[162] There remains a significant difference, in that *National League of Cities*, like *Fry v. United States*,[163] contained an issue which the Court frequently confronts — the extent to which state sovereignty can shield states from otherwise generally applicable federal regulations.[164]

155. *FERC*, 456 U.S. at 753.
156. 22 U.S. 1 (1824).
157. *FERC*, 456 U.S. at 754 n.18 (quoting *Gibbons*, 22 U.S. at 75).
158. *Id.* (quoting Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 14 (1976)).
159. *Id.* at 758 n.23. *See also* Maryland v. Wirtz, 392 U.S. 183, 196-97 n.27 (1968).
160. *FERC*, 456 U.S. at 758.
161. 426 U.S. 833 (1976).
162. *FERC*, 456 U.S. at 758.
163. 421 U.S. 542 (1975).
164. *FERC*, 456 U.S. at 758-59.

The Court acknowledged that "the Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.'"[165] At the same time, the Court discussed section 210 of PURPA which substantively required the Mississippi Public Service Commission to adjudicate disputes that emerged from the statute.[166] This provision is similar to provisions of the Telecommunications Act that require state administrative agencies to resolve disputes between telecommunication carriers.

The Supreme Court additionally cited *Testa v. Katt*,[167] which addressed the Emergency Price Control Act (EPCA).[168] The EPCA gave jurisdiction over price claims to both state and federal courts. Contrary to the arguments that have been raised in suits arising from the Telecommunications Act, Rhode Island refused to entertain claims arising under the EPCA in state courts. The decision in *Testa* upheld the federal program, finding that "state courts have a unique role in enforcing the body of federal law, and that the Rhode Island courts had 'jurisdiction adequate and appropriate under established local law to adjudicate this action.'"[169] "Thus the state courts were directed to heed the constitutional command that 'the policy of the federal Act is prevailing policy in every state.'"[170]

In *FERC*, the Court went on to support its opinion that state courts should be mandated to review actions arising from federal legislation implemented at the state level by commenting that, "[a]ny other conclusion would allow the States to disregard both the preeminent position held by federal law throughout the Nation . . . and the congressional determination that the federal rights granted by PURPA can appropriately be enforced through state adjudicatory machinery."[171] The Court further noted that the *Testa* opinion emphasized that such an approach, "flies in the face of the fact that the States of the Union constitute a nation," and

165. *Id.* at 759 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 290 (1981)).
166. *Id.* at 750-51.
167. 330 U.S. 386 (1947).
168. Emergency Price Control Act, 56 Stat. 23 (1942).
169. *FERC*, 456 U.S. at 760 (quoting *Testa*, 330 U.S. at 394).
170. *Id.* (quoting *Testa*, 330 U.S. at 393).
171. *Id.* at 760-61.

"disregards the purpose and effect of Article VI of the Constitution."[172]

This holding required a comparison to the arguments set forth in the various circuit court and United States Supreme Court decisions interpreting the Telecommunications Act. The PURPA and telecommunications legislation are similar in that they both rely on a cooperative federalism model requiring states to take on a primary role in implementing and interpreting the legislation. Both pieces of legislation incorporate provisions for judicial review of state agency decisions. In the instance of the PURPA model, both the legislation itself and the courts mandated that joint federal and state court jurisdiction was required, valid and necessary. A contrary result has been reached with respect to the court review provisions of the Telecommunications Act.

A historical overview of Congress's goals has demonstrated a shift in the desires of the federal government implementing federal legislation at the state level. When the federal government desired concurrent federal and state judicial review of administrative agency actions in *Testa*, they cited the Commerce Clause as providing the power for such a program. The federal government, fifty years later, shifted positions to exclude any state court review of administrative agency decisions under the Telecommunications Act. While the powers granted under the Commerce Clause are broad, does it necessarily follow that the federal government can cite the same provision of the Constitution to further an opposing position relating to similar legislation depending on the prevailing federal whims at the time? There can be an acknowledgement that the Court has undergone a shift during the last fifty years, encouraging a more robust role for the federal government, while simultaneously lessening the states' powers. While more recent decisions have started to limit federal government powers, an overhaul to a more state-centric approach to federal legislation will take a great deal more time.

While the decisions following *FERC* have altered the powers of Congress in relation to the states under the Tenth Amendment, it is clear that the states' powers have been subrogated with respect to federal legislation implemented at the state level. While *Printz* and *New York v. United States* have provided some level of security to the states, the federal government has still retained the ability to intrude into some of the states' most basic functions.

172. *Id.* at 761 (quoting *Testa*, 330 U.S. at 389).

The current constitutional interpretation is that the provision of powers delegated to the federal government under the Telecommunications Act is valid. However, one consequence has been that Pennsylvania has lost its ability to oversee an essential governmental entity, the PUC, in an area that has traditionally been a state-regulated prerogative.

State sovereignty has been modified since the founding of our country as the needs of its citizens have changed and evolved. However, "the authority to make . . . fundamental . . . decisions" is perhaps the quintessential attribute of sovereignty.[173] This foundation of our governmental structure is absolute and cannot be adjusted for the convenience of federal legislation when the need presents itself.

VII. PENNSYLVANIA CONSTITUTIONAL AND STATUTORY PROVISIONS ADDRESSING THE POWER OF ADMINISTRATIVE AGENCIES

A. *Pennsylvania Constitutional Provisions and Statutorily Conferred Power for Administrative Agencies*

The previous section addressed whether the federal government had the power to usurp constitutionally protected powers in Pennsylvania. The proper scope for federal supremacy in the areas covered by the Commerce Clause will be an issue that will be debated ad naseum in this country. However, in the limited confines of the debate over the Telecommunications Act, blame for the loss of inherent state powers cannot be reserved exclusively for the federal government. The Pennsylvania Legislature and its offspring, the Pennsylvania PUC, are the entities that deserve the greatest scrutiny for their negligence towards the protection of Pennsylvania rights and powers.

The Commonwealth of Pennsylvania has a strong interest in using its state court system to resolve litigation involving its own agencies and affairs that take place within its borders. State administrative agencies are entities created by state legislatures. If state courts are prohibited from reviewing decisions of administrative agencies, the administrative agency is not required to answer to the state, thereby precluding judicial oversight, resulting in a lack of recourse for parties aggrieved by the agency.

The Pennsylvania Constitution, article I, section 11, declares that any citizen has the right to file suit against the Common-

173. *Id.* (citing Nat'l League of Cities v. Usery, 426 U.S. 833, 851 (1976)).

wealth.[174] The PUC, as a governmental agency, should be subject to suits in state court brought by eligible parties, lest the PUC become an infallible state agency. Pennsylvania statutes have codified this Constitutional provision while tailoring it to the issues involving state agencies. Title 42 of Pennsylvania Constitutional Statutes Annotated, section 763 states:

> Except as provided in subsection (c), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:
>
> 1.) All appeals from Commonwealth Agencies under subchapter A of Chapter 7 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Board of Claims, the Environmental Hearing Board, *the Pennsylvania Public Utility Commission*, the Unemployment Compensation Board of Review and from any other Commonwealth agency having statewide jurisdiction.
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> 2.) All appeals jurisdiction of which is vested in the Commonwealth Court by any statute hereafter enacted.[175]

The Pennsylvania General Assembly created the PUC to address the myriad of responsibilities associated with utilities and their proper function in Pennsylvania. The Legislature realized that administrative agencies would need flexibility to adopt new rules. The General Assembly, through the statute, authorized administrative agencies to create such regulations as would be "necessary and proper" to exercise their powers.[176] The Pennsylvania Legislature was also careful to limit the powers of the PUC

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174. P.A. CONST. art. I, § 11 states:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

P.A. CONST. art. I, § 11.

175. 42 PA. CONS. STAT. ANN. § 763 (2004) (emphasis added).

176. The statute describing the powers and duties of the PUC is 66 PA. CONS. STAT. ANN. § 501(b) (2000). 66 PA. CONS. STAT. ANN. § 501(b) states:

> Administrative authority and regulations.--The commission shall have the general administrative power and authority to supervise and regulate all public utilities doing business within this Commonwealth. The commission may make such regulations, not inconsistent with law, as may be necessary or proper in the exercise of its powers or for the performance of its duties.

66 PA. CONS. STAT. ANN. § 501(b) (2000).

by allowing them to promulgate regulations, but also by inserting language in the statute that those regulations "not [be] inconsistent with law."[177]

The acceptance of the Act and the subsequent case law interpreting the Act deprived Pennsylvania courts the express Pennsylvania constitutional grant of power to review decisions of the PUC. When the Act became law, with its provisions for federal court review of agency decisions, express constitutional provisions were violated without approval by the Pennsylvania General Assembly or without modification of the Constitution or relevant statutes. Beyond the express constitutional provisions, the Pennsylvania Legislature has enacted specific statutory guidelines to add precise limitations to the PUC. [178]

B. *Mechanisms for Pennsylvania Court Review of State Agency Decisions*

Pennsylvania courts have allowed governmental agencies the necessary deference to accomplish the duties of the agency, but have been guarded about allowing any room for the expansion of powers unless promulgated by the Pennsylvania Legislature. It is unmistakable that the Legislature, through its codification of the Pennsylvania Constitution, demanded agencies to be held accountable before Pennsylvania state courts. As described in *Standard Pennsylvania Practice*, "[T]he Commonwealth Court has original jurisdiction where an action names a state agency as respondent."[179]

The disregard of existing statutory law by the Pennsylvania Supreme Court in the *WorldCom* opinion flies in the face of previous decisions upholding the ability of the court to review and invalidate state statutes. The proper roles of the Legislature and the courts are some of the most cherished and long-standing legal principles in Pennsylvania jurisprudence. While there is little recent Pennsylvania case law on this subject, settled principles in Pennsylvania provide unmistakable guidance.

The Pennsylvania Supreme Court has adhered to the doctrine that as long as a statute is constitutional, the Legislature is the sole judge of its necessity or expediency. Generally, state courts cannot interfere with this process because it would be contrary to

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177. *Id.*
178. *See* 42 PA. CONS. STAT. ANN. § 763.
179. 1 *Standard Pa. Practice* 2d § 2:159 (2006).

the Commonwealth's policy and established custom.[180] However, there are defined limits to the Legislature's powers, including those expressly set forth in the Pennsylvania Constitution.

In *MCI v. Pennsylvania Public Utility Commission*, the court's decision contradicted this long-standing principle by refusing to apply 42 Pa.C.S.A. section 763, requiring PUC decisions to be reviewed in Pennsylvania Courts. While it is acknowledged that federal legislation would normally take precedent over conflicting state legislation, the revisions to the Act were presented to Pennsylvania to accept or reject, which in either circumstance triggered implementation of the Act and its review provisions.

In circumstances where federal preemption is inevitable, a state court should be wary of the blind deference to the legislation. The state court may not be able to directly strike down federal legislation, but it does have the ability to reject a state agency's ability to accept federal legislation that specifically contradicts state law.

VIII. LIMITATIONS ON THE POWER OF ADMINISTRATIVE AGENCIES

Historically, the courts have delineated the limitations of the PUC's power. An examination of prior court decisions addressing the scope and breadth of power retained by administrative agencies illustrates a strong policy that state agencies are not to exceed the explicit powers given to them by the Pennsylvania Legislature.

The decision in *Rogoff v. Buncher Co.*,[181] describes the court's position that "the [Pubic Utility] Commission has only such powers as are expressly or by necessary implication given to it by Code."[182] Furthermore, the limits of administrative agencies to exercise those powers deemed to be implied in their mandate has also been curtailed when viewed through the holding in *Green v. Milk Control Commission.*[183] *Green* held that the power and authority exercised by administrative commissions must be conferred by legislative language that is clear and unmistakable, since doubted powers are ineffective and tribunals, being extrajudicial, should act within the strict limits that have been defined.[184] Since the Commission derives its authority from legislative action, its powers are confined to those which are expressly granted, or those which may be necessary and proper to carry out acts which

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180. Bradbury v. Wagenhorst, 54 Pa. 180 (1867); Steiner v. Coxe, 4 Pa. 13 (1846).
181. 151 A.2d 83 (1959).
182. *Rogoff*, 151 A.2d at 87.
183. 16 A.2d 9 (Pa. 1940).
184. *Green*, 16 A.2d at 9.

have been specifically declared.[185] The power wielded by the PUC in its acceptance of the Telecommunications Act goes well beyond any legislative mandate. The Pennsylvania decisions addressing the power of administrative agencies demonstrate a judicial posture that should preclude the PUC from accepting any federal legislation that would eliminate state court review of agency decisions. To justify an exercise of authority, the Commission must be able to point to statutory language which, without a forced or a strained interpretation, confers such authority upon the Commission.[186]

The review mechanisms of the Act place the PUC beyond the reach of the state court system, setting precedent which would allow the PUC to operate in a zone of relative impunity with no state judicial oversight to curtail its exercise of power over the utility regulation within the state. There exists no strained interpretation under which the PUC's powers could be interpreted to relinquish court control. In essence, by accepting the Act, the PUC insulated itself from judicial oversight. Even under a reading that the PUC used its implied authority to accept the Act, the result of the action goes well beyond any reasonable scope of the conferred power held by the PUC.

More recent Pennsylvania authority indicates that not all powers utilized by an agency need be express. State courts maintain review power over their state agencies that cannot be validated as an implied power due to the potential to disrupt the constitutional framework of the state.[187] A statute cannot confer upon the Commission the power to do an act or to make an order which deprives a party of a constitutional right.[188]

The Pennsylvania Supreme Court held in *Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Commission*,[189] that administrative agencies are instrumentalities of the state's Legislature, which may perform functions of a quasi-legislative character. While the Pennsylvania Supreme Court realized the

185. Pa. R. Co. v. Pa. Pub. Util. Comm'n, 146 A.2d 352 (Pa. Super. Ct. 1958); Pittsburgh v. Pa. Pub. Util. Comm'n, 43 A.2d 348 (Pa. Super. Ct. 1945).
186. Blue Mountain Consol. Water Co. v. Pub. Serv. Comm'n., 189 A. 545 (Pa. Super. Ct. 1937).
187. *See* Commonwealth Dep't of Envtl. Res. v. Butler County Mushroom Farm, 454 A.2d 1 (Pa. 1982) (holding that the power and authority exercised by administrative agencies must be either expressly conferred or given by necessary implication by the Legislature).
188. Beaver Valley Water Co. v. Driscoll, 23 F. Supp. 795 (W.D.Pa. 1938).
189. 25 A.2d 334 (1942).

need for administrative agencies to perform some functions, the courts have been express in requiring that the prescribed procedure for appeal from a decision of the PUC must be followed, and when proceedings governing rights of appeal are statutorily prescribed, they must be strictly pursued.[190]

The "necessary implication" of the PUC's powers provides some support for the PUC's actions, but it is doubtful that a necessary implication in its mandate would allow the PUC to act independently and accept the Telecommunications Act, thereby altering the constitutional framework of the state. Such a statutory grant of power is well beyond any implied power contemplated by the Pennsylvania Legislature. An administrative agency can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.[191] Administrative agencies are creatures of the Legislature and have only those powers which have been conferred by statute. An administrative agency cannot, by mere contrary usage, acquire a power not conferred by its organic statutes.[192]

IX. THE PENNSYLVANIA SUPREME COURT AND THE PENNSYLVANIA CONSTITUTION

The *MCI WorldCom*[193] opinion cited *New York v. United States*,[194] in support of the allowance of federal legislation to trump the Pennsylvania Constitution. The *New York v. United States* decision supported the position the Pennsylvania court asserted. The *MCI WorldCom* decision, however, provided only a superfluous legal rationale for the position staked out by the court. Previous decisions from all levels of Pennsylvania courts have found "no right to disregard, erode or distort any provision of the Constitution especially where its plain language makes its meaning unmistakably clear."[195] The Pennsylvania Supreme Court must also be cognizant of an agency's interpretation of a particular statute. In the case of an administrative agency, the supreme court defers to the agency's expert interpretation of a

190. York v. Pa. Pub. Util. Comm'n, 295 A.2d 825 (Pa. 1972); George Hyam Assoc., Inc. v. Pa. Pub. Util. Comm'n, 184 A.2d 414 (Pa. Super. Ct. 1962).
191. Commonwealth Human Relations Comm'n v. Transit Cas. Ins. Co., 387 A.2d 58 (Pa. 1978).
192. W. Pa. Water Co. v. Pa. Pub. Util. Comm'n, 370 A.2d 337 (Pa. 1977).
193. 844 A.2d 1239 (2004).
194. 505 U.S. 144 (1992).
195. Commonwealth v. Russo, 131 A.2d 83, 88 (Pa. 1957).

statute for which it has enforcement authority; the court will not reverse the agency's interpretation unless it is clearly erroneous.[196]

The PUC's position in *WorldCom* allowed interpretation of § 252(e)(4) and (e)(6) of the Act in a manner that permitted state court review. Federal circuit courts have not been unanimous in interpreting these two provisions of the Act. The PUC's position could hardly be considered "clearly erroneous" in light of Pennsylvania's constitutional and statutory provisions supporting the PUC's position. Additionally, the Pennsylvania Supreme Court has previously held that when the statutory scheme is complex, judicial deference to the views of the agency is especially necessary.[197] The articles and provisions of the Constitution must be construed together and if there is inconsistency, the specific provision must prevail over the general.[198] In this instance, the words of the Pennsylvania Constitution were express and the Pennsylvania Supreme Court was bound to adhere to state law upholding state court review of PUC decisions.

X. PENNSYLVANIA LEGISLATIVE POWER TO IMPLEMENT FEDERAL LEGISLATION

The Pennsylvania Legislature has been given the power to create and define the duties of administrative agencies, but Pennsylvania courts have articulated limits on the powers that the Legislature possesses in this arena. The power of the state's Legislature with respect to its entities, such as municipal corporations and school districts, is absolute so long as the Pennsylvania Constitution is not contravened and the United States Supreme Court will not intervene.[199] There is no "parliamentary sovereignty," and legislative investigations must be kept strictly within their proper bounds so that the orderly and long-established processes of the coordinate branches of government may be maintained.[200]

The Pennsylvania courts have upheld the constitutionality of all statutory means that are plainly adapted to achieve a legitimate

196. Popowsky v. Pa. Pub. Util. Comm'n., 706 A.2d 1199, 1203 (Pa. 1997).

197. *Popowsky*, 706 A.2d at 1203; Rohrbaugh v. Pa. Pub. Util. Comm'n., 727 A.2d 1080 (Pa. 1999).

198. Cali v. City of Philidelphia, 177 A.2d 824, 829 (Pa. 1962).

199. Chartiers Valley Joint Sch. v. County Bd. of Sch. Dir., 112 Pitts.L.J. 429 (Pa. Com. Pl. 1964).

200. McGinley v. Scott, 164 A.2d 424, 431 (Pa. 1960).

end and are within the scope of federal Constitution.[201] Additionally, it is also well settled in Pennsylvania that a "right conferred by Constitution is beyond the reach of legislative interference."[202] These decisions exemplify that the mandate to create legislation is broad, but the legislature must adhere to the constitutional limitations that are placed on its power. The current dispute clearly shows a violation of these principles.

Pennsylvania courts have addressed the limits of the general assembly's powers, stating, "[t]he General Assembly may exercise all powers which are properly legislative, and *which are not taken away by the state or federal [C]onstitution.*"[203] The court in *Powell v. Commonwealth*[204] held that the general assembly could exercise all legislative powers, except those which are prohibited by express words or necessary implication.[205] These decisions reemphasize that the express language of the Pennsylvania Constitution should prohibit the acceptance of the Act, as it clearly contravenes existing statutes and separation of power principles in Pennsylvania.

XI. CONCLUSION

It cannot be disputed that there has been a trend among the courts of this country towards the expansion of the federal government's powers. While some powers granted to the federal government have been necessary, the slow and steady erosion of the states' powers present troubling questions about our ability to maintain a balance between the powers of the federal government and those powers reserved for the states. The Telecommunication Act's provision for excluding state court review of administrative agency decisions has presented Pennsylvania with the prospect of losing its ability to regulate a state agency created under the Pennsylvania Constitution.

While the powers of the federal government are becoming well-settled, more troubling issues have arisen with respect to the powers that administrative agencies have been granted by state legislatures. Through its acceptance of the Act, the Pennsylvania PUC has immunized itself against any state court oversight regarding decisions involving the Act. The Pennsylvania Legislature has

201. Highland v. Russell Carriage and Snow Plow Co., 135 A. 759, 761 (Pa. 1927).
202. *In re* New Britain Borough Sch. Dist., 145 A. 597, 598 (Pa. 1929).
203. Commonwealth *ex rel.* Elkin v. Moir, 49 A. 351, 358 (Pa. 1901) (emphasis added).
204. 7 A. 913 (Pa. 1887).
205. *Powell*, 7 A. at 914-15.

made little progress to compensate for the discrepancy between the powers that the PUC possesses under the Act and the constitutional and statutory prohibitions that expressly deny the PUC the right to bypass state court review. The PUC's power grab at the Commonwealth's expense must serve as an alarm for the Legislature, signifying that the public commissions they create and oversee must be carefully scrutinized with thorough oversight in order to avoid similar situations that will undoubtedly arise with the continued prevalence of joint federal and state legislation.