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Constitutional Struggle Over Telecommunications Regulation

by RITA M. CAIN*

Introduction

Nearly 200 years after the United States Constitution was ratified, lawmakers still struggle with the delicate balance of power that the Constitution establishes between the federal and state governments. For several years, telecommunications regulation has provided a legal battleground for the states to square off against federal regulators. In recent years, the Federal Communications Commission (FCC) has usually prevailed on claims that federal telecommunications policy and regulation preempted inconsistent state regulations. In 1986, however, the states scored a significant comeback victory in Louisiana Public Service Commission v. FCC.¹ In that case, the Supreme Court reversed an FCC order that outlawed various state telephone depreciation regulations which conflicted with FCC depreciation methods and policies. The relevance of the decision, in light of the recent history of federal preeminence in telecommunications regulation, is the subject of this article.

Section I of this article discusses the legal bases for federal preemption of state regulation. Section II examines preemption precedents in telecommunications law. Section III examines the Louisiana Public Service Commission v. FCC decision in detail. Finally, section IV discusses the immediate economic impact of that decision as well as its legal impact on other telecommunications preemption issues.

* Assistant Professor of Business Law, Henry W. Bloch School of Business and Public Administration, University of Missouri at Kansas City; B.A., Rockhurst College, J.D., University of Kansas. The author is an attorney for United TeleSpectrum, Inc., the mobile communications subsidiary of United Telecommunications, Inc.

¹ 106 S. Ct. 1890 (1986).
I

Federal Supremacy Justifies Preemption of State Laws

The United States Constitution provides the overarching authority for all federal preemption orders. Under our constitutional system the states are sovereign governments. The Constitution, however, specifically limits that sovereign state power in some areas, granting exclusive authority to the federal government.\(^2\) In addition to express limitations on state power, the Constitution prohibits all state laws that conflict with federal law.\(^3\) Most preemption cases are based on a federal claim that otherwise permissible state action conflicts with federal law and contravenes the Supremacy Clause.\(^4\)

The problem for lawmakers is determining when state action conflicts with federal law or policy such that the state law must be preempted.

A. Dominant Federal Interest

In certain areas of law, the federal interest may be so pervasive and dominant that federal law must singularly control. Thus, all state laws in these uniquely federal areas will conflict with the federal statutory scheme because the federal scheme is intended to occupy the field of regulation.\(^5\) Preemption of state law is a common result.

For example, in *Hines v. Davidowitz*,\(^6\) the Supreme Court held that the Federal Alien Registration Act of 1940 precluded

\^2. These exclusive powers include the power to make treaties, to coin currency and to declare war. *U.S. Const.* art. I, § 10.

\^3. *U.S. Const.* art. VI, cl. 2. The Supremacy Clause reads:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

\^4. In *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), one of the earliest Supreme Court preemption decisions, the Court held that state laws in conflict with an act of Congress must yield to the federal law. In *Gibbons*, the state of New York was prevented from barring a federal navigation licensee from using New York's navigable waters.


\^6. 312 U.S. 52 (1941).
any state legislation dealing with alien registration. In *Hines*, the Court specifically denied the state of Pennsylvania authority to enforce its Alien Registration Act of 1939. The Court stated that the power of the federal government is supreme in the field of foreign affairs, including immigration, naturalization and deportation. Since the federal government represents the interests of all states in the conduct of foreign affairs, no state "can add to or take from" the force and effect of federal laws in this area. Only one alien registration law — the federal law — can stand.

Similarly, in *Pennsylvania v. Nelson*, the Supreme Court held that the Smith Act of 1940, which prohibited sedition against the United States, precluded prosecution of such acts under any parallel state legislation. The Court stated that sedition is a crime against the nation, not a local offense. For this reason, prosecution for seditious acts must be exclusively within the federal government's control.

In reaching its decision, the *Nelson* Court noted three factors that mandate exclusive federal regulation in any given area. First, the scheme of federal legislation may be so pervasive that one may reasonably infer that "Congress left no room for the states to supplement it." Second, the federal interest in a subject may be so dominant that it can be "assumed to preclude enforcement of state laws on the same subject." Finally, even consistent, parallel state legislation can hamper uniform federal enforcement or administration. Pennsylvania's sedition prosecutions were viewed as potentially conflicting legislation and were invalidated.

In a recent "dominant interest" case, *White Mountain Apache Tribe v. Bracker*, the Supreme Court denied the state of Arizona authority to impose motor carrier and fuel taxes on non-Indian entities transporting timber on an Arizona Indian

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7. Id. at 73–74.
8. Id. at 62.
9. Id. at 63.
11. Id. at 509.
12. Id. at 505.
13. Id.
14. Id. at 502 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
15. Id. at 504 (quoting Rice, 331 U.S. at 230).
16. Id. at 506.
reservation. The Court noted the strong historical federal interest in promoting Indian tribal self-governance.\textsuperscript{18} Further, the Court cited several examples of the comprehensive nature of federal regulations governing harvest, sale, and management of tribal timber.\textsuperscript{19} It held, "[t]here is no room for these taxes in the comprehensive regulatory scheme."\textsuperscript{20}

Thus, \textit{White Mountain} illustrates that the \textit{Hines} and \textit{Nelson} rationales still apply today, even in cases not involving foreign policy or national security. State economic legislation can be invalidated in the face of a dominant federal interest and pervasive federal regulation.

\textbf{B. Federal Preemption Despite Shared Federal and State Power}

In \textit{Nelson},\textsuperscript{21} the Supreme Court noted that its decision did not call for preemption when Congress had given the states and the federal government concurrent jurisdiction in an area.\textsuperscript{22} However, preemption is sometimes mandated even though a federal statute may provide for, or permit, joint regulation.\textsuperscript{23} In these cases, the state's exercise of its statutory authority has been deemed inconsistent with the federal regulatory response. Either compliance with both state and federal law is impossible\textsuperscript{24} or the state's regulation contravenes federal objectives, notwithstanding the federal statutory enabling language intended to permit concurrent state regulation.\textsuperscript{25} In either case,

\begin{itemize}
  \item \textsuperscript{18} Id. at 144.
  \item \textsuperscript{19} Id. at 145-47.
  \item \textsuperscript{20} Id. at 148.
  \item \textsuperscript{21} See supra note 10.
  \item \textsuperscript{22} \textit{Nelson}, 350 U.S. at 500. See also supra notes 9-14 and accompanying text.
  \item \textsuperscript{23} See generally R. Rotunda, J. Nowak & J. Young, supra note 5, at 623.
  \item \textsuperscript{24} See, e.g., \textit{Lawrence County v. Lead-Deadwood School Dist.}, 469 U.S. 256 (1985).
  \item \textsuperscript{25} See \textit{Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.}, 467 U.S. 461 (1984). The Michigan Agricultural Marketing and Bargaining Act was held inconsistent with the intent and purpose of the Federal Agricultural Fair Practices Act. Although both statutes had the stated purpose of insulating agricultural producers from coercion by processors and producers associations, the Michigan statute established a state-administered system of exclusive, organized and certified bargaining agents for produce. The Court held that the state-accredited agent could have the same coercive effect on producers that the federal statute prohibits. Thus, the Michigan statute circumvented federal protection and was stricken
\end{itemize}
the contrary state law must yield to the letter or spirit of the federal law.

The Communications Act of 1934\textsuperscript{26} establishes concurrent state and federal jurisdiction over telecommunications. Despite the shared regulatory authority, state and federal telecommunications regulators have repeatedly clashed over the extent of their respective power. Thus, telecommunications regulation has been fertile ground for federal preemption law.

II
Telecommunications Preemption: Pre-Louisiana
Public Service Commission

A. The Good Old Days

When Congress passed the Communications Act of 1934,\textsuperscript{27} it created the FCC. The FCC assumed the telephone regulatory authority formerly vested in the Interstate Commerce Commission (ICC) and replaced the Federal Radio Commission as the federal regulator of the radio spectrum.\textsuperscript{28}

One purpose of the Communications Act of 1934 was to address the federal-state ratemaking conflict concerning the Shreveport Doctrine which had emerged out of \textit{Houston, East and West Texas Railway v. United States},\textsuperscript{29} better known as the Shreveport Rate Case. In \textit{Shreveport}, the Supreme Court held that the ICC could regulate rates of strictly intrastate shippers if the intrastate rates unreasonably discriminated against interstate shippers who charged ICC-imposed rates.\textsuperscript{30} Thus, under the Shreveport Doctrine, federal regulators could investigate and alter rates of strictly local service providers upon a finding of discriminatory intrastate rates.

Although the ICC never imposed a Shreveport-type ruling against a state utility commission in dealing with rates of a local

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\textsuperscript{27} Id. at 477-78.
\textsuperscript{28} Id.
\textsuperscript{30} Id. at 358. In \textit{Shreveport}, a Texas regulatory commission had established intrastate shipping rates for Texas carriers that undercut ICC rates imposed upon Louisiana carriers shipping in Texas. The Court held that the Texas intrastate regulation was immune from federal scrutiny only to the extent that the intrastate rates did not unreasonably discriminate against interstate commerce.
communications provider, the National Association of Regulatory Utility Commissioners (NARUC) urged the 1934 Congress to address and eliminate the Shreveport Doctrine in the Communications Act of 1934.\textsuperscript{31}

The resulting legislation attempted to reconcile the federal regulatory goal of uniform, nationwide radio and wire communications systems with the state regulatory objective that local subscribers receive quality service at reasonable rates. To meet these dual ends, the Act delegates certain powers to the FCC and leaves other powers strictly in the hands of state regulators.

For example, the FCC must “make available, so far as possible, to all the people of the United States, a rapid, efficient, nation-wide, and world-wide wire and radio communication service.”\textsuperscript{32} The Commission executes this appointed task by granting licenses,\textsuperscript{33} establishing technical standards\textsuperscript{34} and policing licensees for technical and procedural compliance.\textsuperscript{35}

On the other hand, the Commission is expressly denied jurisdiction over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.”\textsuperscript{36} Thus, the states have complete authority over in-state facilities and practices of their local service providers, and over rates paid by their constituents.\textsuperscript{37}

Within this legislative framework, state and federal telecommunications regulators have tackled their appointed tasks. During the era of non-competitive telephone service prior to the 1960s, state and federal regulatory objectives were consis-

\textsuperscript{31} See McKenna, Preemption Under the Communications Act, 37 FED. COMM. L.J. 1, 13 n.34 (1985) (citing Regulation of Interstate and Foreign Communications by Wire or Radio: Hearings on S. 2910 Before the Comm. on Interstate Commerce, 73rd Cong., 2d Sess. 180 (1934) (testimony of General Solicitor Benton, Nat'l Ass'n of Regulatory Util. Comm’n); Regulation of Interstate and Foreign Communications by Wire or Radio, and for Other Purposes: Hearings on H.R. 8301 Before the Comm. on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 70 (1934) (testimony of General Solicitor Benton, Nat'l Ass'n of Regulatory Util. Comm'n)).


\textsuperscript{33} See, e.g., 47 U.S.C. §§ 214, 301 (1976) (section 214 requires a carrier to obtain a “certificate” from the FCC).

\textsuperscript{34} See, e.g., 47 U.S.C. § 305 (1976).


\textsuperscript{36} 47 U.S.C. § 152(b) (1976).

\textsuperscript{37} Other areas in which the states are left some discretion include valuation of a local carrier's property, 47 U.S.C. § 213(h) (1976), and regulation of facilities in a local service area that straddles a state boundary line, 47 U.S.C. § 221(a). See, e.g., New York Telephone Co. v. FCC, 631 F.2d 1059, 1064-65 (2d Cir. 1980).
tent and regulators were not at jurisdictional odds. However, in the 1960s the FCC sought to make telecommunications services, including telephone service, competitive. At the same time, cable television regulation presented new "state versus federal" challenges. The stage was set for the preemption battles to follow.

B. The FCC's Winning Record

1. Cable TV and the Telephone Connection

In 1968, the Supreme Court unanimously upheld the FCC's decision to regulate cable television signals in United States v. Southwestern Cable Co. Southwestern Cable Company had sought to avoid federal regulation on the grounds that it operated only intrastate facilities, over which the FCC is denied jurisdiction.

The Supreme Court soundly rejected this interpretation of the FCC's authority. First, it noted that cable providers retransmit "communications that have very often originated in other States." For this reason, the activities at issue were not intrastate. On a more fundamental level, the Court emphasized the FCC's "broad authority" and "comprehensive mandate" granted by the 1934 Congress. Regulation of cable TV, the Court said, is "reasonably ancillary to the effective performance of the Commission's various responsibilities."

Following this decision, the FCC exercised jurisdiction over the services local telephone companies provide to cable TV companies. In General Telephone Co. of California v. FCC, in an opinion by then-Judge Warren Burger, the D.C. Circuit affirmed an FCC order requiring FCC certification of channel service that telephone companies provided to cable companies.

38. McKenna, supra note 28, at 2.
39. Id. at 2-3.
41. 47 U.S.C. § 152(b) (1976). In Southwestern Cable, the FCC was not preempting any allegedly conflicting state regulation. The Commission, however, was exercising jurisdiction that the cable provider alleged was denied the FCC by section 152(b). 392 U.S. at 169 n.29. Southwestern Cable, and other cases in which the FCC asserts its authority to license, reflect the same statutory authority arguments proffered by the states in preemption cases.
42. Southwestern Cable, 392 U.S. at 169.
43. Id. at 172-73.
44. Id. at 178.
The federal certificate was required even when the telephone facilities were entirely within a single state. Burger relied on the Supreme Court's decision in *Southwestern Cable* in holding that the telephone companies' service offerings to the cable providers made the telephone companies "an integral part of interstate broadcast transmissions." Further, the court felt that federal regulation was necessary and was within the Commission's authority under the Act, stating that "fifty states and myriad local authorities cannot effectively deal with bits and pieces of what is really a unified system of communications." With these favorable opinions under its belt, the Commission began to implement a policy of injecting competition into the previously monopolized telecommunications fields. In 1975, the Commission promulgated rules prohibiting each telephone company and its affiliates from providing cable TV service in the telephone company's local service area. In *General Telephone Co. of the Southwest v. United States*, the Fifth Circuit agreed with the Commission's argument that the telephone companies' control over phone poles and conduits allowed the telephone companies to hinder cable competition by denying or delaying a competitor's access to those critical connections. The court held that the Commission's statutory authority, to provide a nationwide telephone service and to issue licenses for the public convenience and necessity, gave the Commission "ample jurisdiction" to prohibit telephone companies from offering cable TV service in their local service areas.

In *General Telephone Co. of the Southwest*, the court did not deem the FCC action contrary to section 152(b) of the Communications Act of 1934, which denies the Commission jurisdiction over intrastate facilities and services. Relying on *Southwestern Cable*, the court upheld FCC action as permissible regulation of interstate communications, even though the cable TV service the telephone companies sought to offer would be strictly local.

Although *General Telephone Co. of the Southwest* denied the

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46. *Id.* at 401.
47. *Id.*
48. 47 C.F.R. § 63.54-57 (1975).
49. 449 F.2d 846 (5th Cir. 1971).
50. *Id.* at 854.
51. *Id.*
52. *Id.* at 855.
53. *Id.*
telephone companies authority to enter the cable TV market, the rationale was a pro-competition one: to insure against telephone company monopolization of essential facilities. The FCC subsequently began preemption various state regulations that protected telephone company monopolies, in order to promote competition in areas previously within the telephone companies' exclusive domain.

2. Telephone equipment: NCUC I

In 1969, the FCC opened the field of customer premises equipment (CPE) to competition.\(^{54}\) Previously, all telephones and related equipment had been provided by the local telephone company. The Commission invalidated various telephone company rules which prohibited use of non-telephone company equipment with the telephone company service.\(^{55}\)

In 1973, the FCC issued a declaratory order preempts the states' authority to regulate against non-telephone company CPE by virtue of discriminatory interconnection rules.\(^{56}\) As authority for the preemption, the FCC asserted that telephone equipment must be connected to the national telephone system because it "is used in common and indivisibly for all local and long distance telephone calls."\(^{57}\) Thus, any state regulation that denied non-telephone company equipment interconnection to the system impinged on the federal power to provide a nationwide system.

The North Carolina Utilities Commission (NCUC) appealed the preemption order, but the Fourth Circuit affirmed in North Carolina Utilities Commission v. FCC (NCUC I).\(^{58}\) The Fourth Circuit established an expansive view of FCC power, despite the section 152(b) limitation on federal jurisdiction. According to the court, "the purpose of [section 152(b)] is to restrain the

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\(^{54}\) CPE is terminal telephone equipment at the customer's place of operation, such as a basic handset, data sets and teletypewriters. Other telephone equipment includes switching equipment at the customer's place of business, such as a private branch exchange (PBX), and switching equipment at the telephone company's central office. See Note, *Competition in the Telephone Equipment Industry: Beyond Telerent*, 86 YALE L.J. 538 n.1 (1976).

\(^{55}\) See, e.g., Carterfone, Decision, 13 F.C.C.2d 420, recon. denied, Memorandum Opinion and Order, 14 F.C.C.2d 571 (1968).


\(^{57}\) Telerent, 45 F.C.C.2d at para 26.

\(^{58}\) 537 F.2d 737, 792 (4th Cir. 1976).
Commission from interfering with those essentially local incidents and practices of common carriage by wire that do not substantially encroach upon the administration and development of the interstate telephone network. Further, the court stated that section 152(b) only limits the Commission's jurisdiction regarding services and facilities "that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications." Under this analysis, all policies and regulations regarding telephone equipment affect interstate commerce because all telephone equipment may be used for both local and out-of-state long distance calling.

Accordingly, the court held that the FCC has jurisdiction over all facilities except those that do not "substantially affect" or encroach upon the interstate network. The language of section 152 denies the FCC jurisdiction over intrastate facilities. In applying that language in NCUC I, however, the Fourth Circuit effectively established a presumption that all facilities are interstate facilities (and within FCC jurisdiction) unless states or local service providers prove the facilities do not substantially affect interstate facilities. With that burden of proof placed upon local regulators, the stage was set for the FCC to preempt many state regulations regarding communications facilities and services that "substantially affect" the national telephone or radio network.

C. Post NCUC I

Relying on NCUC I, the FCC began to implement its pro-competition policy on common carrier services. In California

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59. Id. at 794 n.6.
60. Id. at 793.
61. Id. The court noted that "rate making [sic] typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate in such a way that local regulation of one does not interfere with national regulation of the other." Id. at 793 n.6. The local nature of ratemaking ultimately was critical to the reversal the FCC suffered in Louisiana Pub. Serv. Comm'n. See infra notes 105-34 and accompanying text.
62. 537 F.2d at 792.
v. FCC, the California Public Utilities Commission (PUC) and the National Association of Regulatory Utility Commissioners challenged the FCC's authority to license and regulate foreign exchange and common control switching arrangement carriers and facilities that operate both interstate and intrastate. Specifically, plaintiffs challenged the FCC's grant of operating authority to Southern Pacific Communications Company, allowing it to provide foreign exchange and common control switching arrangement service. Southern Pacific had asked the PUC for authority to provide the service locally in California. Such service would have competed with the intrastate long distance service offered by AT&T and Pacific Telephone and Telegraph, California's Bell System affiliate. The PUC granted Southern Pacific limited interim authority, but when Southern Pacific sought necessary interconnection from Pacific Telephone, Pacific Telephone sought guidance from the California PUC. Southern Pacific sought protective rulings from the FCC.

The FCC concluded that its section 151 licensing jurisdiction clearly permitted it to grant Southern Pacific interstate authority. Since the Southern Pacific facilities would be used for both interstate and intrastate communications that would be "technically and practically difficult" to separate, the FCC concluded that it had jurisdiction to regulate Southern Pacific's intrastate operations. The regulatory protection the Bell Company sought from the PUC to avoid competition from Southern Pacific would be inconsistent with the FCC's authority. Additionally, any protective ruling for Pacific Telephone activity is undertaken for profit, AT&T v. FCC, 572 F.2d 17, 26 (2d Cir.), cert. denied, 439 U.S. 875 (1978). See also Frieden, The Computer Inquiries: Mapping the Communications/Information Processing Terrain, 33 FED. COMM. L.J. 55 (1981).

64. 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978).
65. Foreign exchange allows a person to maintain a local phone in multiple service areas. Calls between these phones, then, are local calls, not long distance. Common control switching arrangement permits multiple offices (and phones) of a single customer to be linked through a telephone company switch so that calls between the various offices are local, not long distance. California v. FCC, 567 F.2d at 87 n.2.
66. Id. at 88.
67. If Southern Pacific's private systems could not be interconnected to the rest of the nationwide telephone system through the local Bell affiliate, the private system users could never call outside the private system. Interconnection by AT&T and Bell System affiliates for other common carriers is mandatory. See, e.g., AT&T, Memorandum Opinion and Order, 52 F.C.C.2d 727 (1978).
68. AT&T, Memorandum Opinion and Order, 56 F.C.C.2d 14, para. 24 (1975).
69. Id. at para. 16.
would violate FCC precedents that require Bell companies to provide interconnection for "other common carriers." For these reasons, the FCC ruled in favor of Southern Pacific in all respects, establishing it as a long distance competitor in the region.

In a rather terse five-paragraph opinion that relied heavily on NCUC I, the D.C. Circuit affirmed. The court stated that the FCC's interconnection authority and interstate licensing jurisdiction gave it the power to establish competition between the "other common carriers" and the formerly monopolistic telephone companies for long distance revenues.

Following this expansion of jurisdiction, the Commission attempted to promote competition in the telecommunications industry by permitting resale and shared use of interstate private line services, and resale of interstate toll service and WATS. In each case, the Commission outlawed such resale and shared use restrictions that formerly existed in tariffs filed with the FCC or state commissions. Additionally, the FCC rejected arguments of state utility commissions from California, Michigan, Kansas, and Alabama and preempted restrictions on "physically intrastate" WATS based on the interstate nature of the service offered, rather than on the location of the physical link.

The final significant FCC jurisdiction victory came in 1982, in

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70. Id. at 20-21.
71. California v. FCC, 567 F.2d at 87.
72. Although the proceedings were completely separate, the FCC's pro-competition policy in long distance and other areas was consistent with the Department of Justice's action against AT&T that resulted in the divestiture from AT&T of Bell System companies. Divestiture has resulted in the appearance of many new long distance service providers. See United States v. AT&T, 552 F. Supp. 131 (D.C. Cir. 1982).
75. Id. at paras. 11-13.
76. See AT&T, Memorandum Opinion and Order, 94 F.C.C.2d 1110 (1983).
the proceeding known as the *Second Computer Inquiry*, or *Computer II* (77). In *Computer II*, the FCC sought to clarify the fuzzy technological distinction that had developed between computerized data processing, which was deregulated, and computerized communications services, which were regulated. To accomplish this purpose, the Commission abandoned the distinction. Henceforth, according to the FCC order, the only distinction would be between basic transmission service, which would be regulated, and enhanced service and customer premises equipment (CPE), which would be deregulated (78).

To facilitate deregulation of CPE, the FCC "unbundled" CPE from basic service "by discontinuing rate regulation of CPE and ordering that CPE be sold separately from basic communications service in a competitive market." (79) Further, to ensure that its dichotomized regulatory scheme would be nationally uniform, the Commission preempted all state regulation of enhanced services and CPE (80).

According to the Commission, preemption was permissible because the now-deregulated CPE was being used for inter-state, as well as intra-state, communications. Preemption was

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(78) 77 F.C.C.2d at paras. 92-97. Enhanced service is any service other than basic service. Enhanced service "combines basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." Id. at para. 5. "An example of enhanced service is AT&T's Dial It service, whereby subscribers dial a certain number to gain access to stored information such as scores of professional sports contests." Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 205 n.18 (D.C. Cir. 1982); see also Computer II Reconsideration Decision, 84 F.C.C.2d at 55, paras. 13-14 (1981).


(80) Second Computer Inquiry, Memorandum Opinion and Order, 84 F.C.C.2d 50, para. 155 (1980), further reconsideration, 88 F.C.C.2d 512, paras. 35, 85 (1981). The preemption order required that providers remove charges for the enhanced services and customer premises equipment from tariffs filed with local utility commissions.
necessary because a federal deregulation program cannot work if states continue to regulate enhanced services and CPE as adjuncts of basic service.\textsuperscript{81}

On appeal, the D.C. Circuit fully affirmed the FCC actions.\textsuperscript{82} The court noted that the Commission's broad licensing authority over all interstate wire and radio communications gave it jurisdiction over enhanced services and CPE.\textsuperscript{83} Further, the court agreed with the Commission's finding that enhanced services and CPE are not "common carrier" services under the Communications Act of 1934."\textsuperscript{84} Under either of these reasons, the court believed the FCC's decision to deregulate sale of these services was "sustainable."\textsuperscript{85} The FCC could forbear regulating these services because they could not be identified as common carrier services requiring regulation under the Act. The court also found that the FCC had authority to determine that competition in the sale of these services renders regulation unnecessary.\textsuperscript{86}

The courts soundly rejected arguments that the FCC lacked jurisdiction to preempt state regulation of CPE. The state of California and NARUC complained that the cost of CPE traditionally had been apportioned between intrastate and interstate use, with the intrastate portion being reflected in local telephone rates. They contended that any departure from the scheme violated section 152(b) of the Act, which reserves jurisdiction of intrastate rates, classifications and services exclusively to the states.\textsuperscript{87}

Relying on \textit{NCUC I},\textsuperscript{88} the court rejected the local regulators' claims, and held that "state regulation which impedes a federal regulatory goal must yield to the federal scheme."\textsuperscript{89} The FCC had concluded that a pro-competitive CPE market would best promote an efficient, nationwide telecommunications network. "When charges for CPE are bundled into transmission charges,

\textsuperscript{81} \textit{Second Computer Inquiry}, 88 F.C.C.2d at para. 83 n.34.
\textsuperscript{82} 693 F.2d at 220. The State of California and National Association of Regulatory Utility Commissioners were both appellants. The Louisiana Public Service Commission was an intervenor. \textit{Id.} at 198.
\textsuperscript{83} \textit{Id.} at 207-08.
\textsuperscript{84} \textit{Id.} at 209.
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.} at 214.
\textsuperscript{87} \textit{Id.}
\textsuperscript{88} See \textit{supra} note 58 and accompanying text.
\textsuperscript{89} \textit{Computer and Communications Indus. Assn.}, 693 F.2d at 215.
... the benefits of a competitive market are partially lost because consumers' freedom of choice is limited. The only way to give consumers a valid choice of CPE, the FCC decided, was to sever CPE charges from transmission charges on both federal and state levels. The court agreed.

The states attempted to distinguish NCUC I from this rationale. CPE tariffing directly impacted the states' ratemaking function, whereas the NCUC I ruling, that non-telephone company equipment be given fair interconnection, did not. Furthermore, section 152(b) was specifically intended to preserve the states' exclusive local ratemaking role, in response to the Shreveport Rate Case. Thus, the states contended, preemption of local CPE tariffing violated the fundamental purpose of section 152(b) in a way that the NCUC I interconnection-related rulings did not.

The court disagreed. It held that the deregulation of CPE used in interstate communications did not amount to federal ratemaking for intrastate communications service in violation of section 152(b). The court stated that preemption principles do not apply less to states' ratemaking authority than to other state authority. Rather, preemption is justified whenever conflicting local regulation frustrates validly adopted federal policy.

While the FCC was receiving such overwhelming approval of its actions from the D.C. Circuit, the Commission was also issuing its depreciation preemption orders, which the Supreme Court would eventually reverse in Louisiana Public Service Commission.

90. Id.
91. Id.
92. See supra notes 57-61 and accompanying text.
93. See supra notes 27-37 and accompanying text.
94. Computer and Communications Indus. Assn., 693 F.2d at 216. The states' ratemaking authority was ultimately the basis of the Supreme Court's reversal of the FCC's depreciation preemption order in Louisiana Pub. Serv. Comm'n. See infra notes 98-125 and accompanying text. The distinction between the states' ratemaking authority, given by section 152(b), and all other regulatory authority was critical in the FCC's radio paging cases. See infra notes 153-74 and accompanying text.
95. See supra note 1.
The States Win A Comeback Victory: Louisiana Public Service Commission v. Federal Communications Commission

A. FCC Orders Regarding Depreciation of Telephone Property

The Louisiana Public Service Commission litigation had a somewhat capricious beginning at the FCC. In 1980, the FCC changed two telephone depreciation practices. First, for depreciation purposes, the Commission permitted telephone companies to group telephone plant costs according to estimated service life. Previously, telephone plant costs had to be classified and depreciated according to year of installation. The change was intended to more accurately match capital recovery with capital consumption.

Second, the 1980 Report and Order mandated “remaining life” depreciation, as opposed to “whole life” accounting. According to the FCC, the remaining life method would permit erroneous depreciation estimates to be corrected in midcourse, assuring full recovery of the asset cost.

In 1981, the FCC introduced a regulation that required labor and material costs for inside wiring of a home or business to be expensed in the year incurred. Formerly, these costs were depreciated over time as capital investments. NARUC petitioned the FCC to clarify the inside wiring depreciation order, maintaining that the order did not preclude state commissions from employing different depreciation practices in their states. Over the objections of two dissenters, the FCC concluded that its depreciation orders did not preclude state regulators “from using other accounting or depreciation procedures for intrastate ratemaking purposes.” The Commission examined the relevant sections of the Communications Act of 1934 and found that the Act did not require state commissions to adhere to federal depreciation requirements. The dissenters argued that

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97. 83 F.C.C.2d at para. 2.
98. Id. at paras. 2-3.
99. Id. at paras. 76-84.
102. 89 F.C.C.2d at para. 8.
preemption of inconsistent state depreciation practices was both intentional and appropriate.\textsuperscript{103} The FCC was moving the telecommunications industry into the "brave new world" of competition with these depreciation orders. Conflicting state depreciation practices encouraged the monopoly \textit{status quo}, contrary to the FCC's pro-competitive policy.\textsuperscript{104}

One year later, on a petition for reconsideration, the FCC reversed its decision and followed the lead of previously dissenting Commissioners Fogerty and Jones.\textsuperscript{105} The Commission held that section 220(b) of the Communications Act of 1934,\textsuperscript{106} which addresses depreciation, gives the Commission primary authority over depreciation practices. Accordingly, conflicting state depreciation policies were preempted by the section 220(b) delegation of authority to the federal regulators.\textsuperscript{107} Alternatively, the Commission held that its displacement of conflicting state depreciation regulation was necessary to prevent valid federal policy from being frustrated by state policies that did not adequately provide for capital recovery in competitive environments. "State depreciation rate prescriptions . . . would frustrate the accomplishment of that policy [competition] and are preemptable by this Commission." \textsuperscript{108}

Twenty-four state utilities commissions appealed the reconsideration order in their respective federal circuits.\textsuperscript{109} The Fourth Circuit affirmed the FCC order.\textsuperscript{110} The court did not analyze whether section 220 preempts state depreciation rules that conflict with federal depreciation regulations. Relying on \textit{NCUC I}, the court affirmed the preemption order because the FCC could preempt any regulation it concluded would frustrate federal policy.\textsuperscript{111} The Supreme Court granted certiorari.\textsuperscript{112}

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 1109 (Fogarty and Jones, dissenting).
\item \textsuperscript{104} \textit{Id.} at 1111.
\item \textsuperscript{105} Amendment of Part 31, Memorandum Opinion and Order, 92 F.C.C.2d 864 (1983).
\item \textsuperscript{106} 47 U.S.C. § 220(b) (1976).
\item \textsuperscript{107} 92 F.C.C.2d at paras. 13-17.
\item \textsuperscript{108} \textit{Id.} at para. 33.
\item \textsuperscript{109} See 28 U.S.C. § 2342(1) (1976) (The statute gives the court of appeals exclusive jurisdiction over appeals of final FCC orders.).
\item \textsuperscript{110} Virginia State Corps. Comm'n v. FCC, 737 F.2d 388 (4th Cir. 1984).
\item \textsuperscript{111} \textit{Id.} at 392.
\item \textsuperscript{112} Louisiana Pub. Serv. Comm'n v. FCC, 106 S. Ct. 1890 (1985). Originally, the Louisiana Public Service Commission appealed its case to the Supreme Court, rather than moving for review by petition for certiorari. After the Court granted certiorari petitions, the Louisiana Public Service Commission asked that its appellate jurisdic-
B. The States Finally Persuade the Highest Court to Their Position

Justice Brennan wrote the *Louisiana Public Service Commission* majority opinion, in which Justices White, Marshall, Rehnquist and Stevens joined.113 Contrary to the Fourth Circuit's approach, the Supreme Court examined only the statutory scheme regarding federal regulation of depreciation methods in determining whether the Communications Act permitted concurrent state depreciation requirements. The Court did not assess the wisdom of any FCC pro-competition policy, nor did it determine which practices would best effectuate those policies.114 Despite the FCC claim that state depreciation practices were thwarting legitimate federal policy, the Supreme Court held that the Communications Act denied the Commission authority to dictate depreciation regulations to the states.115

1. *Section 151 versus Section 152(b)*

The petitioners successfully argued that the language of section 152(b) of the Act specifically denies the FCC authority over depreciation regulation.116 They stated that section 152(b) gives the states exclusive authority over depreciation methods because depreciation methods directly impact and play an integral role in establishing "charges" and "classifications" for local telephone service.117

The FCC and its supporting intervenors were also armed with statutory language which, they argued, gave the Commission exclusive jurisdiction over depreciation regulation. The respondents argued that, pursuant to section 151, the FCC could preempt any state regulations that have the effect of hin-

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114. 106 S. Ct. at 1894.
115. *Id.* at 1894-95.
116. The critical limiting language of 47 U.S.C. section 152(b) reads:
   Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to... charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . .
117. 106 S. Ct. at 1897.
dering federal telecommunications policies, because section 151 confers broad authority to effectuate a nationwide communications system on the Commission. This argument relied on the FCC's successful preemption precedents, such as *NCUC I* and *Computer II*.118 In this case, the FCC claimed that the state depreciation regulations hindered competition in the telephone industry, contrary to the FCC's policy that competition will benefit the industry and its users. For these reasons, the Commission argued, contradictory state depreciation rules could not stand.

a. Depreciation as "Ratemaking" Under Section 152(b)

The Supreme Court first discussed how depreciation affects telephone rates. The Court explained that depreciation is integral to the state ratemaking function:

The total amount that a carrier is entitled to charge for services, its "revenue requirement," is the sum of its current operating expenses, including taxes and depreciation expenses, and a return on its investment "rate base" . . . . In the telephone industry, which is extremely capital intensive, depreciation charges constitute a significant portion of the annual revenue requirement recovered in rates. . . .119

Various accounting methods alter depreciation expense, which, in turn, alters rates charged to local telephone users. The Supreme Court agreed with the petitioners' argument that section 152(b) gives exclusive ratemaking power to the states. Thus, federal depreciation mandates impact rates and denies the states their statutory autonomy regarding local ratemaking.120

The FCC countered that the section 152(b) language of "rates," "classifications," and "charges" refers only to the charges imposed on customers for services, not to depreciation charges. Accordingly, section 152(b) would not limit FCC power to regulate depreciation.121

The Court rejected the FCC's narrow reading of section 152(b) and looked instead to industry practice, and to the FCC's own use of the words "charges," "classifications," and "prac-

118. See *supra* notes 47-83 and accompanying text.
119. 106 S. Ct. at 1896-97.
120. *Id.* at 1899.
121. *Id.* at 1899-1900.
Ample authority indicated that those terms are used to denote depreciation practices and charges for the utility rate base, not just practices and charges regarding customer services. The FCC's proffered interpretation of the language at issue would ignore realities of industry ratemaking practices. The Court further noted the broad language of the Act: "[N]othing in this Chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges . . . in connection with intrastate communication service . . . ." The Court read the language of the Act broadly and said it "contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction." Section 152(b) is not limited to rates that providers charge customers for services.

The Court also rejected the FCC's argument that the states' authority under section 152(b) should be confined to intrastate regulation that is separable from and does not substantially affect interstate communications. The FCC argued that state depreciation practices impede recovery of plant investment and telephone companies are discouraged from new investment, to the detriment of the nationwide network.

The Court held that the FCC has been denied power to act in any way regarding intrastate ratemaking and, thus, the FCC does not have the power to preempt state regulation in the area of "depreciation practices for intrastate ratemaking purposes." The FCC cannot create power for itself when Congress expressly has denied it that power, even when the FCC's purpose is to effectuate legitimate federal policy.

b. Section 151 Does Not Justify Preemption

The FCC's second argument relied on its broad authority conferred by section 151. The Fourth Circuit had deferred to the FCC's general licensing and policymaking authority when it affirmed preemption of state depreciation practices. The

122. Id. at 1900.
123. Id.
125. 106 S. Ct. at 1901.
126. Id.
127. Id.
128. Id.
129. Id.
FCC and its supporting intervenors argued before the Supreme Court that state depreciation regulations frustrate the FCC’s goal of ensuring competitive, nationwide telephone service.  

However inclined it might be to find broad FCC powers based on section 151, the Supreme Court held that it could not affirm preemption based on a broad policymaking argument. The specific limitation on FCC jurisdiction found in section 152(b) precluded holding for the Commission based on its general licensing authority. Section 152(b) specifically denies the FCC jurisdiction in areas such as intrastate ratemaking, of which depreciation is an integral part. The Court stated that its reading of section 152(b) was supported by the rule of statutory construction that statute sections should be interpreted to avoid a conflict. The Court’s reading “naturally reconciled” sections 151 and 152(b), to articulate a national goal of creating a rapid, efficient telephone system and “enact[ing] a dual regulatory system to achieve that goal.”

Even if sections 151 and 152(b) could not be reconciled in this case, the Court stated that it would not be inclined to favor the section articulating a general statutory purpose (section 151) over one which specifically “defines the jurisdictional reach of the agency formed to implement that purpose.”

For these reasons, the Court held that section 152(b), not section 151, controlled the outcome. The FCC does not have the power to preempt state depreciation regulations based on its broad licensing authority. The states are given exclusive ratemaking authority, of which depreciation is an integral part.

2. Section 220 Does Not Occupy the Field of Depreciation Regulation

Section 220(b) directs the FCC to prescribe classes of property for which depreciation charges may be included under “operating expenses” when the service provider sets rates. The section also prohibits telephone companies from departing from these classifications and from allocating depreciation of any other property to operating expense. The FCC argued that

130. Id. at 1898-99.
131. Id. at 1899.
132. Id.
133. Id. (emphasis in original).
134. Id.
section 220 proves that Congress intended the Commission's depreciation regulations to occupy the field of depreciation regulation, thus preempting any conflicting state depreciation rates or practices. The FCC also asserted that, in a construction of section 220 and section 152(b), specific sections should prevail over general ones. Section 220 specifically deals with depreciation. Section 152(b) should not bar FCC regulation of depreciation in light of the specific section 220 depreciation rule.

The Court rejected this argument on two grounds. First, the Court noted that section 152(b) deals with jurisdiction and section 220 deals with depreciation. Although section 152(b) is more "general" than section 220, the sections are not general or specific relative to the same subject matter or to each other.

Second, section 152(b) states its own rule of statutory construction which would apply to the construction of the Act in lieu of any standard canon of construction. Section 152(b) states that nothing (presumably including section 220) shall be construed to give the FCC the power it sought. This language precludes any other statutory interpretation that would give the FCC jurisdiction.

Section 220 is captioned "Accounts, records and memoranda." The Court considered it "plausible," as the petitioners' argued, that section 220 gives the FCC authority over the carriers, bookkeeping practices, including depreciation recordation, so that investors and regulators can get an accurate picture of the carriers' financial health. Whatever its full scope, the Court held that section 220 does not occupy the field of depreciation regulation so as to justify preemption.

The Court also noted that the Communications Act "contains some internal inconsistencies, vague language and areas of uncertainty." The contentions of the parties did not perfectly fit into this statutory puzzle. For purposes of intrastate ratemaking, however, section 152(b) bars federal preemption of depreciation regulation.

136. 106 S. Ct. at 1898.
137. Id. at 1902 n.5.
138. Id.
139. Id.
140. Id. at 1903.
141. Id.
142. Id. at 1904.
C. The FCC Asks, "What Happened?"

The *Louisiana Public Service Commission* decision drastically diverges from the sweeping preemption authority the FCC had previously enjoyed. As former FCC Common Carrier Bureau Chief Phillip Verveer stated, the "[s]tates have lost every fight over preemption for years and years, because a body of law had been formed at the appellate level [affirming FCC preemptions]."¹⁴³ Now, the Supreme Court "has fundamentally reordered the allocation of power between the federal government and the States."¹⁴⁴

The *Louisiana Public Service Commission* decision represents a fundamental shift. The Court clearly rejected the notion that the FCC has unlimited power to preempt any state action that contravenes federal telecommunications policy. The Court held that the FCC's authority to set telecommunications policy is limited by the language of the statute, which expressly reserves to the states some authority.

Specifically, the decision rejects the reasoning in *Computer II*¹⁴⁵ that preemption principles do not require distinctions between states' ratemaking authority and other authority. In *Computer II* the D.C. Circuit relied on *NCUC I*¹⁴⁶ in holding that even the states’ ratemaking authority must yield to valid federal policy.¹⁴⁷ Minimally, *Louisiana Public Service Commission* rejects this analysis and denies FCC preemption power when the power impinges on state ratemaking authority. The Supreme Court decision focused closely on the role of depreciation practices in ratemaking. Since ratemaking is an exclusive state power, federal preemption which directly impacts ratemaking is improper. The issue now for the FCC and the states is whether the Court’s decision limits FCC preemption power in non-ratemaking cases.

¹⁴³. *TELECOM PUBLISHING GROUP, CAPITAL PUBLICATIONS, STATE TELEPHONE REGULATION REPORT* 7 (1986).
¹⁴⁴. *Id.*
¹⁴⁵. *See supra* notes 68-83 and accompanying text.
¹⁴⁶. *See supra* notes 58-61 and accompanying text.
¹⁴⁷. *See supra* notes 90-94 and accompanying text.
IV

Impact of Louisiana Public Service Commission

A. $$$

The economic repercussions of the Louisiana Public Service Commission decision have been swift and sure. Telephone companies that had switched to the federal depreciation methods from conflicting state practices generally had reaped greater revenues as a result. However, most of the changes were contingent on the success of the FCC case on appeal. Now, with the decision that state depreciation methods are improperly displaced, the circuit courts, on remand, will order refunds to telephone customers of the “ill-gotten” increased rates.

In Louisiana, the named state in the Supreme Court appeal, the largest refund may be forthcoming. Louisiana Public Service Commission Secretary Louis Quinn stated that refunds related to depreciation expense “could exceed $100 million.” 148 An Arkansas Public Service Commission spokesperson roughly estimated that Southwestern Bell might have to refund up to twenty-eight million dollars in Arkansas. 149 An Ohio Public Utilities Commission spokesperson estimated twenty million dollars in refunds are forthcoming in that state. 150 “The immediate [e]ffect of [the] Supreme Court ruling allowing states to determine their own intrastate depreciation rates may mean state-ordered refunds to subscribers totalling at least $148 million, although some Wall Street analysts say the long-term effects of the decision could be even greater.” 151 Those additional losses allegedly will result when telephone companies cannot adequately recover costs through depreciation. The result is that future investment in innovative technology will be curtailed and service, in general, will suffer. 152

148. TELECOM PUBLISHING GROUP, CAPITOL PUBLICATIONS, STATE TELEPHONE REGULATION REPORT at 3-4.
149. Id. at 4.
150. Id. On October 1, 1986, this author received a $16.70 refund from Southwestern Bell Telephone Company, pursuant to a Kansas Corporations Commission Order reflecting reinstatement of Kansas depreciation practices in lieu of the federal schedules.
151. Id. at 3.
152. Id. at 6.
B. Legal Ramifications

1. Radio paging services

The state versus federal power struggle was quickly reversed in *Louisiana Public Service Commission*. Not only did the FCC's string of preemption victories come to a halt, but two other FCC preemption orders pending appeal on the date of that decision have already fallen in the wake of the new Supreme Court precedent.

On August 22, 1986, the FCC's order preempting state entry regulation for licenses in the sub-FM frequencies was reversed by the D.C. Circuit in *California v. FCC.* Then, on September 22, 1986, the FCC requested that its order preempting state entry regulation of public mobile paging licensees be remanded from the D.C. Circuit to avoid almost certain reversal after the FM Subcarrier reversal.

In both the *California v. FCC* and public mobile paging case, the FCC sought to make paging services more competitive by licensing multiple providers to use the FM radio subchannel or public mobile radio bands, in order to provide paging services in a given locale. Many states, however, had statutes that insured monopolies in these services for the current service provider. A federal licensee who sought to implement his federal license in these states would be summarily denied the requisite state authority to construct and operate a new, competing paging system. Subsequently, the federal license would lapse for disuse.

In both the *California v. FCC* and the public mobile paging case, the FCC relied on its "general licensing" authority in section 151 to support preemption of state regulation that conflicted with federal telecommunications policy. Further-

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153. *California v. FCC*, 798 F.2d 1515 (D.C. Cir. 1986). The FM radio spectrum is divided into a main channel and subchannels. Formerly, the FM subchannels could be used only for broadcast services. The FM subcarrier docket opened use of these subchannels to common carriers for non-broadcast services, such as paging. *See id.* at 1517.


156. 47 C.F.R. § 22.43(a)(2)(1987). This section requires construction of the facility to be completed within 12 months of federal authorization.

157. *See, e.g.*, *California v. FCC*, 798 F.2d at 1517.
more, in both cases the FCC held that the section 152(b) limitation on its intrastate authority was "subject to the provisions of section 301." Section 301 directs the FCC "to maintain the control of the United States over all channels of radio transmission." Thus, the Commission argued that despite a limitation on its jurisdiction over rates, classifications, and charges in intrastate service, the FCC retained overarching jurisdiction regarding radio communications, including regulation of radio licensees—both intrastate and interstate.

In these latest preemption attempts, as in *Louisiana Public Service Commission*, the FCC could not rely heavily on its favorable preemption precedents, which permitted preemption based on the interstate nature of the facilities. Paging facilities using either FM subchannels or public mobile radio bands usually are local services. For this reason, the Commission relied on its general licensing authority in section 151 and its pervasive radio regulation authority in section 301. It argued that state regulations that caused paging licensees to forfeit licenses because of disuse were contrary to the FCC's authority to establish competitive paging systems nationwide through the use of multiple grants of paging licenses.

In *California v. FCC*, the California Public Utilities Commission argued that section 152(b) of the Act denied the Commission jurisdiction over paging, since it is an intrastate service.

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158. *Id.* See also 47 U.S.C. § 301 (1982).
160. See *supra* notes 36-83 and accompanying text.
161. The Supreme Court noted that the interstate nature of the services argument had not been strongly pressed by the Commission because separation of interstate and intrastate facilities for depreciation purposes was a long-standing practice. *Louisiana Pub. Serv. Comm.*, 106 S. Ct. 1890, 1902 (1986).
162. In the public mobile paging case, the FCC noted that many paging providers were trying to provide "regional" paging systems, which would emit radio paging signals simultaneously in more than one state. These systems permit the customer to carry only one pager, subscribe to only one paging service and still receive service in a wide, multi-state territory. These providers complained that various restrictive state regulatory schemes prohibited "interstate" services because the provider was often denied state operating authority in one of the states in the regional system. See *In the Matter of Preemption of State Entry Regulation in the Public Land Mobile Service*, No. 85-89, paras. 5-6 (FCC March 31, 1986). The FCC preemption order, although citing these concerns, did not strongly rely on this "interstate" argument because most of the paging regulation the FCC was preemption was regulation of strictly local paging service.
Thus, the Commission had no authority to preempt.\textsuperscript{164} The FCC acknowledged that the states could continue to regulate rates, charges and services of providers in their states.\textsuperscript{165} However, in this case, the FCC claimed it was only denying the states the authority to regulate who could operate paging services in the states.\textsuperscript{166} Preemption over \textit{entry} regulation, as opposed to rate regulation, was necessary to preserve the federal radio licensing power.\textsuperscript{167} Without such preemption, licensees whom the FCC deemed appropriate or necessary service providers could be barred by the states from operating. A regulatory scheme based on the states’ reading of section 152(b) would prevent the FCC from effectuating its plan for efficient use of the limited radio spectrum through competitive licensing, contrary to sections 151 and 301.\textsuperscript{168}

The D.C. Circuit rejected the FCC’s argument and reversed.\textsuperscript{169} The court stated that “[t]he appropriate resolution of this case is suggested in \textit{Louisiana Public Service Commission v. FCC}.”\textsuperscript{170} Although the court acknowledged that the Supreme Court’s decision limited the FCC preemption power regarding “intrastate ratemaking authority,”\textsuperscript{171} it refused to distinguish the subcarrier FM preemption on state entry regulation from the objectionable depreciation/ratemaking regulation in \textit{Louisiana Public Service Commission}. The court inferred that such a distinction defies logic.\textsuperscript{172} Despite the FCC’s assertion that its preemption action was limited enough to satisfy section 152(b)’s limit on FCC jurisdiction, the court said that the Commission’s rationales for preemption suggested “wholesale displacement of state regulation,”\textsuperscript{173} contrary to sec-

\textsuperscript{164} California v. FCC, 798 F.2d 1515, 1519 (D.C. Cir. 1986).
\textsuperscript{165} 57 Rad. Reg. 2d (P & F) at para. 1.
\textsuperscript{166} Id. at para. 3.
\textsuperscript{167} 55 Rad. Reg. 2d (P & F) at para. 21.
\textsuperscript{168} Id.
\textsuperscript{169} 798 F.2d at 1520.
\textsuperscript{170} Id. at 1518.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 1519.
\textsuperscript{173} Id. The three rationales for preemption that would result in “wholesale displacement of state regulation” are: (1) conflict with FCC licensing determinations; (2) frustration of beneficial use of the radio spectrum; and (3) impediment to competition. Id. at 1518. The court’s concern for diminishing state regulatory power when the FCC preempts entry regulation seems to ignore the fact that the identical scheme of limited preemption/limited state regulation is in place in the cellular mobile radio telephone industry today. \textit{See} Amendments of Parts 2 and 22 of the Commissions Rules Relative to Cellular Communications Systems, No. 79318, Reconsideration Order,
The court also rejected the FCC's argument that the states' authority in section 152(b) is subject to the FCC's broad radio regulation authority in section 301. The court held that the statutory scheme of section 152(b) and section 301 indicates an intent to delegate jurisdiction of radio common carriage to the states and to retain FCC jurisdiction over radio transmission.\textsuperscript{174}

Presumably, the court draws a distinction between the physical transmission of radio signals (FCC regulatory realm) and the carrier who transmits the signals (states' regulatory realm). To use the court's words, this differentiation defies logic.\textsuperscript{175} How can the FCC regulate transmission if it does not have, at least, the authority to designate who will so transmit? This "entry" level licensing jurisdiction is all the FCC sought to keep unfettered in both the \textit{California v. FCC} and the public mobile paging case. It appears consistent with section 301, which allows the FCC to issue licenses for radio spectrum use. Yet, the court effectively has denied the FCC final authority to say who will transmit the radio signals, since the states now have veto power over licensees. Under the court's scheme, the FCC only has authority to regulate the radio transmissions of \textit{state-approved} licensees. Surely, the Supreme Court did not intend this result when it sought to protect the states' ratemaking authority in \textit{Louisiana Public Service Commission}.

The \textit{California v. FCC} decision represents a dramatic swing of the preemption pendulum from the D.C. Circuit's opinions in \textit{NCUC I} and \textit{Computer II}, in which the court held that the FCC could limit all state authority, including ratemaking authority, in pursuit of valid federal policy. Now, after the \textit{Louisiana Public Service Commission} reversal, the appellate bench may be ready to handcuff the FCC in all areas of regulation of intrastate services, including entry-level licensing decisions.

After the FCC's defeat in \textit{California v. FCC}, reversal in the public mobile paging case seemed imminent because the FCC's action in the public mobile paging case was based on the same statutory scheme and construction as in \textit{California v. FCC}. Therefore, the FCC requested that its paging preemption order

\footnotesize{\textsuperscript{para. 77-84 (FCC March 3, 1982). The same rationales for preemption of entry regulation in the cellular docket have not led the FCC to "justify preemption of additional areas of State authority," in the cellular industry. \textit{California}, 798 F.2d at 1519.}\textsuperscript{174} 798 F.2d at 1519.\textsuperscript{174} See \textit{supra} note 172 and accompanying text.\textsuperscript{175}}
on appeal be remanded from the D.C. Circuit.\textsuperscript{176}

Based on these facts and critical applications of the \textit{Louisiana Public Service Commission} decision by the highly influential D.C. Circuit, it appears that section 152(b) will be viewed as establishing \textit{total} dual regulatory schemes. Subtle, though real, distinctions between state entry regulation and ongoing regulation of the day-to-day activities of intrastate providers, such as the rates they charge, will not support FCC preemption in entry regulation, even though the Commission leaves rate regulation unscathed. Future telecommunications cases clearly will be affected by this analytical twist.

2. \textit{Miscellaneous Telecommunications Preemption Issues that May Require Rethinking}

Several other telecommunications cases illustrate the impact of the Supreme Court decision. At the time of the \textit{Louisiana Public Service Commission} decision, \textit{Pacific Bell v. FCC}\textsuperscript{177} was pending appeal in the D.C. Circuit. The FCC had preempted state regulation of the intrastate and intracity private lines of the Crowley Maritime Company, based on connection of these lines with the interstate network. Pacific Bell and others appealed. \textit{After Louisiana Public Service Commission}, the FCC moved (just as it did in the public mobile paging case) that the Crowley case be remanded. The Commission said it "may not have adequately addressed . . . issues in the case."\textsuperscript{178} Subsequently, the FCC vacated its Order. It asserted that the case was moot because Crowley Maritime Company had obtained elsewhere the service connections it sought from Pacific Bell.\textsuperscript{179}

The FCC has instituted a rulemaking docket to decide whether to restrict state regulation of shared telephone lines in office buildings or complexes.\textsuperscript{180} This service commonly is called shared-tenant service.\textsuperscript{181} Presumably, the states would

\begin{footnotesize}
\begin{enumerate}
\item On March 30, 1987, the D.C. Circuit vacated the FCC's preemption order: "In preempting state regulation of intrastate common carrier mobile services the Commission has exceeded its statutory authority." NARUC v. FCC, No. 86-1205 (D.C. Cir. Mar. 30, 1987) (decision of Judges Wald, Bork and Ginsburg).
\item See \textit{Pacific Bell v. FCC}, No. 85-1599 (D.C. Cir. 1985).
\item \textit{Telecom Publishing Group, Capitol Publications, State Telephone Regulation Report} at 8.
\item 1 F.C.C. Red. 362, para. 5 (1986).
\item 102 F.C.C.2d 1421 (1986).
\item In a shared-tenant system, occupants of a building, office complex or real estate development use telecommunications equipment located on the premises, and connect to a shared PBX provided by the building owner or developer. Within the
\end{enumerate}
\end{footnotesize}
oppose any limitation on their powers to regulate such services, because the services are predominantly local and competition would cut into the lucrative business subscriber revenues of the local telephone companies. Those business revenues usually subsidize residential telephone service. Thus, indirectly, shared-tenant services impact decisions regarding rates charged to individual subscribers. Faced with this line of argument, which is now bolstered by the Louisiana Public Service Commission decision, the FCC probably would not attempt preemption in the shared-tenant services cases solely on the ground that the services affect interstate communications because they are interconnected to the national telephone network. The FCC must overcome the states’ argument that shared-tenant services impact ratemaking and other day-to-day operational issues within the jurisdictional purview of the states.

In 1985, the FCC held that states cannot prohibit cable TV firms from offering voice and data transmissions in competition with local telephone companies. Again, the FCC justified preemption because the local cable facility is used for interstate transmissions. After Louisiana Public Service Commission, the FCC stated that the case was “in abeyance pending reconsideration.” Presumably the FCC was concerned that an appeal of the Order would mean reversal in light of the Supreme Court decision.

These cases indicate that the FCC's plan would make the telecommunications industry more competitive. However, competition means changing ratemaking and other practices by the local service providers and their state regulatory bodies. The Louisiana Public Service Commission decision will slow the FCC course of action and may cause the FCC to use approaches other than preemption of conflicting state action. Alternative approaches could include amendment of section 152(b) of the

system, users can call without ever connecting to the local telephone company switch. The entire shared system is linked to a telephone company's central office for calling outside the system. The aggregated use of telephone company services requires fewer lines (and resulting loss of revenue to the telephone company) than individual service for each tenant on the system would require. Id. at 1422-23.

183. Id. at 122.
184. TELECOM PUBLISHING GROUP, CAPITOL PUBLICATIONS, STATE TELEPHONE REGULATION REPORT at 9. On November 12, 1986, the Commission vacated its Order. As in the Crowley Maritime case, the Commission found the issues in Cox to be moot because the petitioning carrier was no longer providing the service that was the basis for the case.
Communications Act and increased efforts at the state level to conform state regulatory policy with federal policy. The FCC's course over the next few years will not be as smooth as it was in the two decades preceding 1986.

Conclusion

In *Louisiana Public Service Commission*, the Supreme Court referred to historic preemption cases such as *Hines*\textsuperscript{185} and *Rice*\textsuperscript{186} to set the legal framework for its decision.\textsuperscript{187} The Court explained that Congress can establish federal law as the exclusive law of the land if the issues or areas of law warrant it.\textsuperscript{188} On the other hand, Congress can give federal and state lawmakers concurrent jurisdiction, which the 1934 Congress did in the telecommunications field. Once Congress so spoke, this dual regulatory scheme was the law of the land in telecommunications. Thus, orders by the FCC that attempt to expand FCC power beyond its delegated authority contravene the congressional statutory mandate. The depreciation orders which led to the *Louisiana Public Service Commission* decision are examples of excessive federal action.

However, *California v. FCC* also appears to contradict congressional intent. By failing to make a distinction between entry-level regulation and ratemaking and other day-to-day regulation, which is the dual regulatory scheme described in *Louisiana Public Service Commission*, the *California v. FCC* decision may contravene congressional intent to give federal regulators ultimate licensing authority. Further judicial interpretation or legislative action may be necessary to clarify the parameters of federal and state telecommunications jurisdiction in this new competitive era.

\textsuperscript{185} See *supra* notes 5-8 and accompanying text.
\textsuperscript{186} See *supra* notes 13-14 and accompanying text.
\textsuperscript{187} 106 S. Ct. at 1898-99.
\textsuperscript{188} *Id.* at 1898.