Louisiana v. FCC: Its Implications for the Balance of Power between State and Federal Authorities in Telecommunications Regulation

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Karin Leonard Sonneman
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Executive Summary

- Since the late 1960s, the Federal Communications Commission (FCC) has pursued policies that encourage competition and loosen regulatory constraints in the domestic interstate telecommunications industry. The FCC's policies have not always been compatible with state commissions' telecommunications regulatory policies, generally because opening up domestic interstate telecommunications to competition has had uninvited affects on the intrastate jurisdiction, specifically, the local telephone ratepayer.

- The FCC's competitive policies and the states' general opposition to those policies precipitated several cases in the late 1970s and early 1980s in which United States courts of appeals accorded broad preemptive powers to the FCC. The FCC's preemptive actions and its success in winning court approval of those actions led to increasing jurisdictional tensions over the balance of power between state and federal telecommunications regulatory authorities.

- The origins of today's battles, however, can be traced to basic constitutional interpretations of the Supremacy Clause and the Commerce Clause of the U.S. Constitution. Further, technological innovation in the telecommunications industry has helped to blur further what was always difficult to distinguish: what constitutes interstate versus intrastate telecommunications for regulatory purposes. From a technical perspective, the facilities used to originate and complete an interstate telephone call are virtually the same and inseparable from those used for an intrastate call.

- This inseparability helped the FCC become extremely successful in court when challenged on preemption actions. However, the FCC's victories were dulled significantly by the U.S. Supreme Court's rejection in 1986 of FCC preemption of state regulation in Louisiana Public Service Commission et al. v. Federal Communications Commission et al.

- Was Louisiana a mere aberration or was it a watershed in the ongoing jurisdictional battle for power between federal and state authorities in the regulation of telecommunications?

- This examination suggests that Louisiana stands not only for the simple declaration that the FCC cannot preempt state regulation of intrastate telephone depreciation practices, but also has reset the balance of power in telecommunications regulation by forcing the FCC to be more cautious and careful when considering preemption of state regulation. Louisiana was a complex decision that sought to examine and interpret the congressional intent of the Communications Act, written more than 50 years ago, apply it to an industry which has since undergone a technological revolution, and establish the jurisdictional boundaries of the often-conflicting authorities regulating the industry.

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Preface

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This paper is an updated version of a paper the author wrote for an independent research study class at William Mitchell. When the original version of the paper was completed in the summer of 1988, the author was a principal rates analyst on the staff of the Minnesota Public Utilities Commission specializing in telecommunications.

CHAPTER ONE

INTRODUCTION

Since the late 1960s, the Federal Communications Commission (FCC) has pursued policies that encourage competition and loosen regulatory constraints in the domestic interstate telecommunications industry.[1] The FCC's policies have not always been compatible with state commissions' telecommunications regulatory policies.[2] This has generally been the case because opening up domestic interstate telecommunications to competition has had uninvited effects on the

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[1] Among the early and more significant of the initial decisions made by the FCC that signalled a more competitive regulatory policy was the FCC's Carterfone decision. See Carterfone, 13 FCC 2d 420, 13 R.R. 2d 597, recon. denied, 14 FCC 2d 571, 14 R.R. 2d 185 (1968). Here, the FCC allowed the use of interconnecting devices to be attached to the telephone system in competition with Bell System equipment. Further evidence of the FCC's competitive and regulatory policy toward domestic communications can be recognized in the Supreme Court's summary of the respondents' suggestion in Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U. S. 355 (1986), (hereinafter, Louisiana) "that the heart of the cases [referring to the appeals brought by the petitioners in Louisiana] is whether the revolution in telecommunications occasioned by the federal policy of increasing competition in the industry will be thwarted by state regulators who have yet to recognize or accept this national policy and who thus refuse to permit telephone companies to employ accurate accounting methods designed to reflect, in part, the effects of competition." (Louisiana, 476 U. S. at 358-359)

[2] Edythe S. Miller, formerly a member of the Colorado Public Utilities Commission, questioned the wisdom of the rush by the FCC to deregulate telecommunications. She argued that the telecommunications industry lends itself to monopoly or at least oligopoly – its interdependence in system planning and coordination of the networks makes the industry inseparable and interrelated. She contended that under these conditions "it would take a leap of faith to move from [the point that the industry is a natural monopoly] to the position that the telecommunications industry is competitive." She argued that the inseparability and interrelatedness of the industry makes telecommunications an infertile ground for the growth of competition, but that this was precisely the "rationale for FCC preemption and unregulation." (E. Miller, FCC Preemption, State Telecommunications Deregulation and the Public Interest, paper presented at the Seventeenth Annual Conference of the Institute of Public Utilities, Michigan State University, Williamsburg, Virginia, December 9, 1985, at pages 17-18)

intrastate jurisdiction, specifically, on the local telephone ratepayer.[3]

The FCC's competitive policies and the states' general opposition to those policies precipitated several cases in the late 1970s and early 1980s where United States courts of appeals accorded broad preemptive powers to the FCC.[4] The balance of power between state and federal telecommunications regulatory authorities seemed clearly tipped in favor

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[3] A prime example of FCC policies and their practical effect on the local ratepayer was the imposition of interstate end-user access charges. See 93 FCC 2d 241, on recon. (Reconsideration Order), FCC 83-356, 48 Fed. Reg. 42987 (September 21, 1983). The FCC ordered that a portion of the interstate toll revenue requirement paid by interexchange carriers instead be paid by local ratepayers in the form of monthly interstate access charges. The FCC justified these charges on the basis that the local ratepayer used exchange facilities that could be used to complete interstate telecommunications. Federal preemption in this case was upheld.

See also National Ass'n of Reg. Util. Comm'rs v. F.C.C., 737 F. 2d 1095 (D.C. Cir. 1984), cert. denied, 469 U. S. 1227 (1985). The Court found that the FCC proposal requiring all telephone subscribers to pay, on a per line basis, for that portion of their necessarily incurred local telephone plant cost that is under the interstate jurisdiction did not overstep the jurisdiction of the FCC.

The effect of FCC decisions on the local ratepayer has been pointed out by Judge Widener in his vigorous dissent of the Fourth Circuit's decision to uphold FCC preemption of state regulation of depreciation practices in Virginia State Corporation Comm'n v. F.C.C., 737 F. 2d 388 at 399 (Fourth Cir. 1984), (hereinafter, Virginia). There he found neither justification nor authority for the FCC actions and that "[t]he final irony is the FCC justification of its action on the ground that it will 'bring the benefits of competition to the ratepayers of this country.' The 'benefits of competition' are higher telephone bills for local ratepayers...." Louisiana is the case that overturned the Virginia decision.

[4] The most notable examples of the U.S. Courts of Appeals recognition of the FCC's preemptive powers were North Carolina Util. Comm'n v. F.C.C., 537 F. 2d 787 (Fourth Cir.), cert. denied, 429 U. S. 1027 (1976), (hereinafter, North Carolina I); North Carolina Util. Comm'n v. F.C.C., 552 F. 2d. 1036 (Fourth Cir.), cert. denied, 434 U. S. 874 (1977), (hereinafter, North Carolina II); California v. F.C.C., 567 F. 2d 84 (D.C. Cir.), cert. denied, 434 U. S. 1010 (1978), (hereinafter, California); Computer and Communications v. F.C.C., 693 F. 2d 198 (D.C. Cir. 1982), cert. denied, 461 U. S. 938 (1983), (hereinafter, CCIA v. FCC). These cases are discussed in chapter 3, section 3.1.4.

of the FCC, but the cases also fueled tensions between federal and state regulators over the direction telecommunications policy should take.

These ongoing federal-state authority conflicts are not present day phenomena. Their origins can be traced to basic constitutional interpretations of the Supremacy Clause and the Commerce Clause of the U.S. Constitution. The earliest case and perhaps the most fundamental case in this century addressing the balance of power between federal and state regulatory authority was fought before the Supreme Court in 1914 in the Shreveport Rate Case.[5]

In the Shreveport Rate Case, the Court affirmed an order of the Interstate Commerce Commission (ICC) which set intrastate railroad rates. This case recognized that controversy between federal and state authorities always arose where interstate and intrastate activities are so intertwined that it becomes utterly impossible to divide them so that each can be confined to the respective jurisdictions exclusively.[6]

In 1934, Congress enacted the Communications Act of 1934 (the Act).[7] In response to the federal-state jurisdictional controversy arising out of the Supreme Court's 1914 Shreveport Rate Case decision, Congress included section 152 (b) in the Act.[8] Section 152 (b) set up a dual

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[5] Houston, East and West Texas Railway. Co. v. United States, 234 U. S. 342 (1914), (hereinafter, Shreveport Rate Case). This case historically has been referred to as the Shreveport Rate Case because it involved the review of an Interstate Commerce Commission order that related to rates between Shreveport, Louisiana, and points within the state of Texas.

[6] Id. at 352. This paraphrases a portion of the opinion where the Court considered the conflicts arising out of interstate and intrastate transactions.

[7] The 1934 Communications Act, 48 Stat. 1064 (Codified at 47 U. S. C. section 151 et seq.).

[8] In Louisiana, the Court concluded: "It [was] certainly true, as respondents assert, that when Congress was drafting the Communications Act, section 152 (b) was proposed and supported by the state commissions in reaction to what they perceived to be the evil of excessive federal regulation of intrastate service such as sanctioned by the Shreveport

jurisdiction regulatory scheme for the regulation of telecommunications: the federal government through the newly-created FCC[9] would regulate interstate telecommunications; state governments would regulate intrastate telecommunications.[10]

Instead of settling the balance of power issue between federal and state regulatory authorities, the Act has served as fodder for dispute over congressional intent regarding where the line was drawn between intrastate and interstate regulatory jurisdictions. The jurisdictional debate has been fueled by the impact that the telecommunications technological revolution has had on fundamental notions of telecommunications regulation in general. Technological innovation in the telecommunications industry has helped to blur further what was always difficult to distinguish: what constitutes interstate versus intrastate telecommunications for regulatory purposes.[11] From a technical perspective, the facilities used to originate and complete an interstate telephone call are virtually the same and inseparable from those used for an intrastate call.

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regulation of intrastate service such as sanctioned by the Shreveport Rate Case...." (Louisiana, 476 U. S. at 372) The Court went on to say that it agreed "that provisions in both the Senate and House bills were designed to overrule the Shreveport Rate Case...." (Louisiana, 476 U. S. at 372-373)

[9] The Act created the FCC to replace all the existing federal agencies which jointly regulated communications. The history of the Act is discussed later in the text in chapter 3, section 3.1.3.

[10] 47 U. S. C. section 152 (b) asserts that "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...."

[11] The Court in Louisiana recognized that the Act's idealized attempt to divide telecommunications into two neat spheres of commerce – interstate and intrastate – has met head on with the practical realities of technology advancement. The Court, in referring to the interstate and intrastate split of jurisdiction, comments: "[I]n practice, the realities of technology and economics belie such clean parceling of responsibility."

In the past, this inseparability problem led the courts to uphold preemption every time the FCC demonstrated that the service or facility in question was impossible to separate into interstate and intrastate parts.[12] The inseparability hurdle facing the states on preemption cases, however, was overcome by the U.S. Supreme Court's rejection of FCC preemption of state regulation in Louisiana. "Before Louisiana, it was easy to remember the rule of thumb applicable to FCC preemption cases focused on section 152 (b) of the Act: The FCC always wins."[13] But after Louisiana, it is not a sure thing that the "FCC always wins."

Was Louisiana a mere aberration in the long string of cases going back more than a decade which upheld FCC preemption of state regulation, or was it a watershed that readjusted the balance of power in the states' favor? Shortly after the Supreme Court's May 27, 1986, Louisiana decision, the U.S. Court of Appeals, D.C. Circuit, on August 22, 1986, sustained a challenge to FCC preemption of state regulation.[14] Then, in a string of cases in the summer and early fall of 1989, the

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[12] The FCC received endorsement of the inseparability theory and the theory of substantial effect (where intrastate telecommunications can be demonstrated to have a substantial effect on interstate telecommunications) when the U.S. Court of Appeals, 4th Circuit, in North Carolina I and North Carolina II established the two-prong test for preemption. The U.S. Supreme Court in Louisiana summarized that test as follows: "Section 152 (b) [of the Act] applies as a jurisdictional bar to FCC pre-emptive action only when two factors are present; first, when the matter to be regulated is purely local and second, when interstate communication is not affected by the state regulation which the FCC would seek to pre-empt." (Louisiana, 476 U. S. at 374)

[13] Quoting from McKenna, "Preemption Reversed: The Supreme Court's Decision in Louisiana Public Service Commission v. FCC," 39 Ad. L. Rev. 53 (hereinafter, McKenna).

[14] See California v. F.C.C., 798 F. 2d 1515 (D.C. Cir. 1986), (hereinafter, FM Radio Subcarrier). Here, the D.C. Circuit set aside an FCC decision to preempt state regulation of intrastate communications services provided over FM radio subcarrier frequencies because the Act did not give the FCC authority to preempt.

D.C. Circuit, while remanding in one case and upholding preemption in two cases, fashioned a preemption analysis based on Louisiana.[15]

The D.C. Circuit's analysis rejects inseparability as an automatic case for preemption; it approves narrow, specifically explained preemptive actions that minimize federal intrusion on state regulatory authority. Where before Louisiana the FCC could steamroll over state regulatory authority, since Louisiana the FCC must carefully carve out only specific areas to be preempted.

Although Louisiana literally addressed conflicts between federal and state regulation of telephone company depreciation practices, the decision can be interpreted in several ways as to its precedential value for future cases involving FCC preemption of state regulation over various telecommunications issues. This paper explores the impact of the Court's decision in Louisiana on state versus federal jurisdictional authority in telecommunications regulation; and it addresses the question of whether Louisiana was a mere aberration or a watershed in the ongoing jurisdictional battle for power between federal and state authorities in the regulation of telecommunications. This paper does not attempt to provide a detailed legal analysis of important past jurisdictional disputes or an exhaustive survey of federal preemption to date.[16] Instead, this paper analyzes Louisiana in the context of the historical record and what Louisiana's precedential value may be for future challenges to FCC preemption actions.

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[15] The three cases were National Ass'n of Reg. Utility Comm'rs v. FCC, 880 F. 2d 422 (D.C. Cir. 1989), (hereinafter, NARUC); Illinois Bell Telephone Co. v. FCC, 883 F. 2d 104 (D.C. Cir. 1989), (hereinafter, Illinois Bell); and Public Utility Comm'n of Texas v. FCC, 886 F. 2d 1325 (D.C. Cir. 1989), (hereinafter, ARCO).

[16] For two comprehensive historical reviews of federal preemption of state telecommunications regulation, see McKenna, Pre-emption Under the Communications Act, 37 Fed. Comm. L. R. 1; and Maher, Legal Aspects of State and Federal Regulatory Jurisdiction Over the Telephone Industry: A Survey (Cambridge, Mass.: Program on Information Resources Policy, Harvard Univ., 1985).

The paper first examines the decision made in Louisiana itself and then proceeds to analyze it in the context of the pre- and post-Louisiana historical record. This includes a review of the relevant constitutional provisions, relevant pre-1934 case law, statutory authority and the relevant post-1934 case law (both pre- and post-Louisiana). Finally, it analyzes Louisiana's implications for future conflicts and controversies between federal and state telecommunications regulation as it applies to the Computer III Appeal.[17]

This examination suggests that Louisiana stands not only for the simple declaration that the FCC cannot preempt state regulation of intrastate telephone depreciation practices, but also that the FCC can no longer preempt state regulation for the mere reason that state regulation stands as an obstacle to federal regulatory policy.

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[17] California v. FCC, U.S. Court of Appeals, Ninth Circuit, No. 87-7230 (hereinafter, Computer III Appeal).

CHAPTER TWO

LOUISIANA: THE DECISION

2.1 THE ISSUES PRESENTED TO THE SUPREME COURT

2.1.1 The FCC Position

The jurisdictional dispute resulting in Louisiana arose out of a December 22, 1982, FCC order reversing its previous decision and preempting state regulation in the area of depreciation.[18] The FCC gave two grounds for preemption. First, the FCC held that section 220 of the Act "did not permit state regulatory commissions to require telephone companies to use depreciation methods and rates that are different from those we prescribe for the same equipment unless we had expressly granted exemptions from this requirement for those companies."[19] The FCC also "held, as an alternative ground for preemption, that the use of different methods and rates by state commissions would frustrate the

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[18] See Amendment of Part 31, 92 FCC 2d 864 (1983), (hereinafter, Depreciation Preemption Order). This order came as a result of the following history: In 1980, the FCC issued an order where it changed two depreciation practices affecting telephone plant. See Property Depreciation, 83 FCC 2d 267 (1980) recon. denied, 87 FCC 2d 916 (1981). Then, in 1981, the FCC issued an order wherein it required inside wire to be expensed rather than capitalized. See Uniform System of Accounts, 85 FCC 2d 818. Later, in 1981, the National Association of Regulatory Utility Commissioners (NARUC) filed a petition with the FCC asking for clarification of the inside wiring order. NARUC specifically sought a declaration that the FCC's order did not intend to preempt state regulatory authority over depreciation practices. In April of 1982, the FCC issued a Memorandum Opinion and Order in which it agreed with NARUC that its order did not preempt state regulators with respect to depreciation practices. See Uniform System of Accounts, 89 FCC 2d 1094 (1982). Several representatives of the telephone industry petitioned for reconsideration of the FCC's Memorandum Opinion and Order on the issue of federal preemption. In response, the FCC reversed itself and issued its Depreciation Preemption Order. The U.S. Court of Appeals, Fourth Circuit, affirmed the FCC's decision in Virginia. Louisiana is the result of the subsequent appeals of the Virginia decision to the U.S. Supreme Court.

[19] Memorandum Opinion and Order, adopted June 24, 1982, 89 FCC 2d 1054 at 1.

goals [the FCC] sought to achieve when [it] adopted new depreciation policies."[20]

The Depreciation Preemption Order was affirmed on appeal to the U.S. Court of Appeals, Fourth Circuit in Virginia, but the decision was accompanied by a vigorous dissent by Judge Widener.[21] Twenty-three state regulatory commissions ("petitioners") – including Louisiana, California, Ohio, and Florida – appealed the Fourth Circuit decision before the U.S. Supreme Court, backed by 30 amici curiae. The Supreme Court, in the Louisiana decision, decided on May 27, 1986, reversed the Fourth Circuit decision.[22]

2.1.2 The State Regulators' Position

The petitioners in Louisiana argued that the Act "expressly denied the FCC authority to establish depreciation practices and charges insofar as they relate to the setting of rates for intrastate telephone

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[20] Id.

[21] See Virginia, 737 F. 2d beginning at 396. Specifically at 399, Judge Widener writes:

> The FCC's post-hoc reinterpretation of legislative history, on which the majority here quite properly does not depend, combined with the unsupported and insupportable statements as to the effect on competition of inconsistent state depreciation methods, do not provide even a modicum of reasoned analysis supporting the FCC's decision to interfere in state ratemaking after several decades of affirmatively espousing the opposite conclusion.
>
> The upshot of the case is that the FCC decided that the carriers needed more revenue than the state regulatory agencies were willing to provide, so it decided to impose different depreciation rates on intrastate equipment for the very purpose of, and thus effectively raising the intrastate rates of the subscribers....

[22] The Fourth Circuit subsequently remanded the proceeding to the FCC with instructions to give effect to the holding of the Supreme Court in Louisiana. On June 24, 1987, the FCC adopted a Memorandum Opinion and Order which vacated its Depreciation Preemption Order.

service."[23] According to the petitioners, the Act clearly established a dual system of regulation over telephone service, vesting in the states exclusive power over intrastate ratemaking. This power included final authority over depreciation practices for the purpose of ultimately setting intrastate rates.

The petitioners' argument focused on section 152 (b) of the Act. The petitioners argued "that the plain and unambiguous language of section 152 (b) denies the FCC power to compel the states to employ FCC-set depreciation practices and schedules in connection with the setting of intrastate rates"[24] (emphasis added).

2.2 THE COURT'S DECISION

The U.S. Supreme Court, in reversing the Fourth Circuit on the preemption issue, refused to assess the wisdom of the FCC's competitive and deregulatory objectives for domestic telecommunications. It also chose not to consider "whether the FCC should have the authority to enforce, as it sees fit, practices which it believes would best effectuate this purpose."[25]

Instead, the Court saw its task as "simply to determine where Congress has placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate service."[26] In analyzing the language, structure, and legislative history of the Act, the Court found that the Act "best supports petitioner's positions that the Act denies the FCC the power to dictate to the States as it has in these cases."[27]

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[23] Louisiana, 476 U. S. at 358.

[24] Id. at 365.

[25] Id. at 359.

[26] Id.

[27] Id.

Although the Court saw as its task simply to determine Congress' intent as applied to depreciation practices, much more can be read into the Court's opinion than the simple determination of which regulatory jurisdiction has preeminent authority over the telephone industry's intrastate depreciation practices. The findings of the Court make a strong case that section 152 (b) of the Act can be applied to bar not only federal preemption of state regulation over depreciation of dual jurisdiction property for intrastate rate-making purposes, but also any intrastate matter. This seems clear for several reasons.

First, the Court did not accept respondent's arguments that section 151 of the Act bars state regulation, which frustrates the ability of the FCC to insure a rapid, efficient, nationwide and worldwide telephone service.[28] Instead, the Court described the jurisdictional limitations on FCC power contained in section 152 (b) as "express"[29]: because of the <u>express</u> nature of section 152 (b), the Court found that 152 (b) was controlling over any implied bar of state regulation that could be read into section 151.[30]

Second, the Court said that the terms of section 152 (b) "fence[d] off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service. Moreover, the language

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[28] 47 U. S. C. section 151 declares the purpose of the Act, which is to regulate "interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...."

[29] <u>Louisiana</u>, 476 U. S. at 370.

[30] The Court interpreted the delegation of and limitations on authority granted to the FCC under sections 151 and 152 (b) of the Act, respectfully, in the following passage: "In broad terms, the Act grants to the FCC the authority to regulate 'interstate and foreign commerce in communication by wire and radio,' 47 U. S. C. section 151, while expressly denying that agency 'jurisdiction with respect to ... intrastate communication service,' 47 U. S. C. section 152 (b)." (<u>Louisiana</u>, 476 U. S. at 360)

with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC."[31]

The Court's language is hardly ambiguous. It seems clear that the Court has given "force and emphasis to the jurisdictional bar of section 152 (b)."[32]

Finally, as if to quell all doubts about the Court's interpretation of section 152 (b) as a strong bar to FCC preemption, the Court applied the rule of construction[33] that, where possible, statutory provisions should be read so as not to create a conflict and agreed with petitioners that sections 151 and 152 (b) were "naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a dual regulatory system to achieve that goal."[34] The Court went even further and, anticipating the natural response (i.e., what if a conflict were found to exist?) said, "[W]ere we to find the sections to be in conflict, we would be disinclined to favor the provision declaring a general statutory purpose [the Court here is referring to section 151], as opposed to the provision which defines the jurisdictional reach of the agency formed to implement that purpose [the Court here is referring to section 152 (b)]."[35]

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[31] Id. at 370. Here, the Court is referring to 47 U. S. C. section 151, which describes the purpose of the Act and the role of the FCC. 47 U. S. C. section 151 is entitled "Purposes of Chapter; Federal Communications Commission created" and reads in part:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio..., there is created a commission to be known as the "Federal Communications Commission...." (47 U. S. C. section 151)

[32] McKenna, supra note 13, at 53.

[33] The Court cited Washington Market Co. v. Hoffman, 101 U. S. 112 (1879) as the case reference for the rule of construction.

[34] Louisiana, 476 U. S. at 370.

[35] Id. at 370.

Thus, the Court, while only saying it was simply ruling on where "Congress ... placed the responsibility for prescribing depreciation methods to be used by state commissions in setting rates for intrastate telephone service,"[36] certainly went out of its way to read section 152 (b) to define the boundaries of the FCC's power with respect to the regulation of the telephone industry and its relationship and balance of power with the states.

An examination of the boundaries of the FCC's power and the federal/state relationship in the regulation of telecommunications established by Louisiana is pursued below in the analysis of Louisiana.

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[36] Id. at 359.

CHAPTER THREE

AN ANALYSIS OF THE LOUISIANA DECISION

The analysis of Louisiana begins with an examination of the relevant constitutional authorities. This is followed by a review of pre-1934 case law relevant to federal preemption of telecommunications, an analysis of the Act, a review of post-1934 pre-Louisiana case law, a post-Louisiana literature review, a review of post-Louisiana case law and how the Computer III Appeal should be decided under a Louisiana-based preemption analysis.

3.1 FEDERAL PREEMPTION: PRE-LOUISIANA

3.1.1 Constitutional Authority

Although Louisiana was a case of statutory rather than constitutional interpretation of agency power, a brief analysis of the constitutional law which defines agency powers will contribute to a better understanding of the federal/state conflict addressed in Louisiana. The U.S. Constitution conferred upon Congress the power to regulate commerce[37] and "[t]o make all laws which shall be necessary and proper for carrying into execution"[38] the power to regulate commerce. The Supremacy Clause[39] makes the laws created by Congress the supreme law of the land. Using these enumerated powers granted by the U.S. Constitution, Congress wrote and enacted the Act. The Act contained provisions which created the FCC,[40] delegated regulatory powers to it[41]

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[37] U.S. Const., art. I, sect. 8, clause 3, (hereinafter, "the Commerce Clause"), which reads: "The Congress shall have the power ... to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

[38] U.S. Const., art. I, sect. 8, clause 18, (hereinafter, "the necessary and proper clause").

[39] U.S. Const., art. VI., clause 2.

[40] 47 U. S. C. section 151.

[41] Id.

and established the dual jurisdictional regulatory system (vesting powers between the interstate and intrastate jurisdictions).[42]

One area of focus when analyzing the federal preemption questions in Louisiana should be an examination of the intent of the relevant enabling legislation. An equally important part of the Louisiana analysis should be an examination of the constitutional powers Congress chose to exercise in drafting the controversial language from which Louisiana springs. This is especially true because "[t]he constitutional principles of preemption, in whatever field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[43]

Since the early 1970s, FCC preemption actions premised on the Commerce and Supremacy Clauses have challenged the regulatory power of the states; the FCC has attacked them as being incompatible with the national interest as espoused by the FCC. Thus, to fully understand and analyze Louisiana, one must review the Commerce and Supremacy Clauses of the U.S. Constitution.

3.1.1.1 The Commerce Clause

The Commerce Clause of the U.S. Constitution reads:

> The Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.[44]

The Commerce Clause is important for two reasons, the latter of which is critical to the analysis of Louisiana. First, under the Commerce

[42] 47 U. S. C. sections 152 (a) and (b).

[43] Amalgamated Assn. of Street, Electric Ry. & Motor Coach Employees v. Lockridge, 403 U. S. 274, at 285-286 (1971).

[44] U.S. Const., art. I, sect. 8, clause 3.

Clause, Congress exercises its most important powers in peacetime.[45] Second, except for the due process and equal protection clauses of the 14th Amendment, the Commerce Clause is the most important limitation imposed by the Constitution on the exercise of state power.[46] It is this restrictive operation of the Commerce Clause that is most important to the analysis of Louisiana.

It is through the general powers granted by the Commerce Clause that Congress can restrict the powers of the state. When the Commerce Clause was drafted, one of the great advantages anticipated from the power it granted to Congress "was that state interferences with trade, which had become a source of sharp discontentment under the Articles of Confederation, would be thereby brought to an end."[47]

In its preemption decisions, the FCC has attempted to use the Commerce Clause with the same anticipation – to end what it perceives as state interferences with its desire to pursue a competitive, deregulatory telecommunications policy – one which has become a source of sharp discontentment between the FCC and the states. One could easily paraphrase Daniel Webster's argument for the appellant in the seminal case on interpretation of the Commerce Clause in Gibbons v. Ogden[48] to support the FCC's position in Louisiana:

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[45] See The Constitution of the United States of America, Analysis and Interpretation, Annotations of Cases Decided by the Supreme Court of the United States to June 29, 1972, prepared by the Congressional Research Service, Library of Congress, Lester S. Jayson, Supervising Editor, USGPO 1973, at page 142 (hereinafter, Constitutional Analysis).

[46] Id.

[47] Id. at 190.

[48] Gibbons v. Ogden, 9 Wheat (22 U. S.) 1, (1824), (hereinafter, Gibbons).

> The prevailing motive [of the FCC is] to regulate [interstate] commerce [by pursuing a policy of encouraging competition within the telecommunications industry]; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many states, and to place it under the protection of a uniform law [the uniform law being the FCC's].[49]

Under Chief Justice Marshall's interpretation of the Commerce Clause in Gibbons,[50] the word *commerce* "covers every species of movement of persons and things, whether for profit or not, across state lines, every species of communication, every species of transmission of intelligence, whether for commercial purposes or otherwise, every species of commercial negotiation which will involve sooner or later an act of transportation of persons or things, or the flow of services or power, across state lines."[51]

One of the key issues in the preemption analysis and the interpretation of the Commerce Clause's applications to the preemption argument before, during, and most likely after Louisiana is the meaning of Marshall's term *across state lines*. To the benefit of federal preemption advocates and supporters, *across state lines* has been expanded to include a wholly intrastate transaction which affects interstate commerce.[52]

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[49] Webster's actual words from his argument before the Court in Gibbons, 9 Wheat, were as follow:

> The prevailing motive was to regulate commerce; to rescue it from the legislation of so many different states, and to place it under the protection of a uniform law."

[50] Marshall wrote that "the subject to be regulated is commerce,... Commerce, undoubtedly, is traffic, but it is something more – it is intercourse." (Gibbons, 9 Wheat at 189)

[51] Constitutional Analysis, supra note 45, at pages 143-144.

[52] See National Association of Regulatory Utility Commissioners v. F.C.C., 746 F. 2d 1492, 241 U. S. App. D. C. 175 (1984), (where the

Another key issue in the preemption analysis is the fact that grants of power to Congress made by the Commerce Clause must be read in conjunction with the necessary and proper clause, which authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers."[53] In the Act, Congress gave the FCC both a general "necessary and proper" clause and for common carrier regulation, a more specific "necessary and proper" clause.[54]

Numerous cases have permitted Congress and those administrative agencies such as the FCC, which have been delegated congressional powers to reach "purely" intrastate activities on the theory embodied in the necessary and proper clause used in conjunction with the Commerce Clause.[55] In Louisiana, the FCC used this theory when it argued that it should have the authority "to enforce, as it sees fit, practices which it believes would best effectuate this purpose" (referring to the asserted federal policy of encouraging competition within the telecommunication industry).[56]

Key to the constitutional analysis of Louisiana, however, is the fact that in the Act, Congress did not exercise the restrictive operation of the Commerce Clause with regard to the states' powers to regulate

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D.C. Court of Appeals found that purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use.) This principle of allowing preemption where a wholly intrastate transaction substantially affects interstate commerce is the second prong of the two-prong preemption test established in North Carolina I and North Carolina II.

[53] U.S. Const., art. I, sect. 8, clause 18.

[54] See 47 U. S. C. section 154 (i) for the general clause and 47 U. S. C. section 201 (b) for the specific clause with respect to common carrier regulation.

[55] See, e.g., Shreveport Rate Case, 234 U. S. 342 where the Court upheld the ICC order which regulated intrastate rates in order to effectuate the ICC's interstate rates.

[56] This is the Court's summary of the FCC's position in Louisiana, 476 U. S. at 359.

communications, nor was it silent on balancing the competing demands of state and national interests in the regulation of telecommunications.[57] In fact, the opposite is true. Congress, through its inclusion of section 152 (b) in the Act, exercised the restrictive operation of the Commerce Clause to "fence off"[58] from the FCC the regulation of intrastate communications. Thus, Congress expressly reserved the power to regulate intrastate communications matters to the states.

3.1.1.2 **The Supremacy Clause**

The Supremacy Clause of the U.S. Constitution reads as follows:

> 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.[59]

Judge Brennan writes in Louisiana that "[t]he Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law" and that "[p]reemption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation."[60] In an opinion written before Louisiana, Brennan also wrote that "the

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[57] Silence would make the Court the final arbiter in the balance of power debate. "[F]or a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests"(Constitutional Analysis, supra note 43, at 239, citing Cooley v. Board of Wardens, 12 How. 299 (1851)).

[58] The Court in Louisiana, 476 U. S. at 370, says that "[b]y its terms, this provision [referring to section 152 (b)] fences off from FCC reach or regulation intrastate matters" (emphasis added).

[59] U.S. Const., art. VI, clause 2.

[60] Louisiana, 476 U. S. at 368-369.

principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[61]

Thus, Brennan was reiterating the preemption test under the Supremacy Clause – that one of two persuasive reasons must exist for preemption to be upheld: one being that Congress says that preemption is allowed in a field of commerce, or alternatively, that Congress's action in a particular field of commerce is so all-inclusive that state regulation in the field is foreclosed.[62]

In Louisiana, the Court makes it clear that Congress prohibited federal preemption in the field of intrastate communications; the Louisiana opinion characterized section 152 (b) of the Act as an "express jurisdictional limitation ... on FCC power."[63]

3.1.2 Case Law: Pre-1934

3.1.2.1 The Shreveport Rate Case

The Court in Louisiana reminded the FCC that section 152 (b) of the Act was written for a purpose: to bar FCC preemption of intrastate communications when the subject of its regulation is separable into interstate and intrastate components. In its discussion on legislative history, the Louisiana Court wrote that section 152 (b) "was proposed and supported by the state commissions in reaction to what they perceived to be the evil of excessive federal regulation of intrastate service such as was sanctioned by the Shreveport Rate Case...."[64]

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[61] See Florida Lime & Avocado Growers v. Paul, 373 U. S. 132, 142 (1963).

[62] This latter reason was suggested by Daniel Webster in his argument before the Supreme Court in Gibbons, 9 Wheat.

[63] Louisiana, 476 U. S. at 370.

[64] Louisiana, 476 U. S. at 372.

The Shreveport Rate Case is one of the fundamental cases in the history of conflict between federal and state regulation of utilities and the balance of power between the two jurisdictions. In the Shreveport Rate Case, the U.S. Supreme Court, applying its interpretation of the Commerce Clause and the statutory authority of the ICC, affirmed the power of the ICC to regulate and set intrastate rates where interstate commerce was threatened.

The importance of the Shreveport Rate Case is noted in the Court's opinion in Louisiana, not so much for the decision itself, but for the effect of the decision; in response to the Shreveport Rate Case, Congress wrote section 152 (b) into the Act. The respondents in Louisiana argued for a narrow reading of section 152 (b) based on their interpretation of the Act's legislative history. The Court responded that the Shreveport Rate Case did not carry the load asked of it by the respondents. The Court said:

> [T]he legislative history reveals that representatives from the industry and the States were fully aware that what was at stake in the Act were broad powers to regulate, including, but not limited to, the setting of individual rates, and that '[t]he question of an appropriate division between federal and state regulatory power was a dominating controversy in 1934.'[65]

The Shreveport Rate Case is also important to understanding the decision in Louisiana as a readjustment in the balance of power in the federal/state regulatory relationship because of the Court's discussion in the Shreveport Rate Case of a principle of law first established in the Minnesota Rate Cases.[66] As stated in the Shreveport Rate Case:

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[65] Louisiana, 476 U. S. at 372.

[66] Minnesota Rates Cases, 230 U. S. 352 (1907), (hereinafter, Minnesota Rate Cases). The Court was asked to hold an entire set of intrastate rates established by the state of Minnesota as void because of its effect on interstate rates. The Court said there had been no finding by the ICC of any unjust discrimination, and thus refused to overturn the Minnesota decision.

> [I]n the absence of a finding by the [ICC] of unjust discrimination[,] intrastate rates were left to be fixed by the carrier and subject to the authority of the States or of the agencies created by the States.[67]

This principle from the Minnesota Rate Cases as cited in the Shreveport Rate Case is applicable to Louisiana. In the Shreveport Rate Case, the discrimination issue arose because for essentially the same class of service, railroad carriers were charging lower rates (which had been approved by the state commission) for intrastate routes than for interstate routes. In Louisiana, the discriminatory practice being alleged was that state depreciation rate requirements thwarted telephone companies' ability to compete with non-regulated entities.

The Court in Louisiana noted the respondent's discrimination argument but dismissed it saying, "What is really troubling respondents, of course, is their sense that state regulators will not allow them sufficient revenues."[68] The Court's rejection of the discrimination argument was foreshadowed in Judge Widener's dissent in Virginia where he argued that "the unsupported and insupportable statements as to the effect on competition of inconsistent state depreciation methods, does not provide even a modicum of reasoned analysis supporting the FCC's decision to interfere in state ratemaking...."[69]

3.1.2.2 Smith v. Illinois Bell

The Shreveport Rate Case is important in the analysis of federal preemption in telecommunications regulation because of its repercussions and resulting action by Congress to write the critical section 152 (b) of the Act. Another landmark Supreme Court telecommunications case is

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[67] Shreveport Rate Case, 234 U. S. at 357.

[68] Louisiana, 476 U. S. at 376.

[69] Virginia, 737 F. 2d at 399.

Smith v. Illinois Bell.[70] Smith is important in the federal preemption analysis and the Act's establishment of the dual system of telecommunications regulation because it recognized that "[t]he separation of the intrastate and interstate property, revenues and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation."[71] This essential element, the separation of telephone company property, revenues, and expenses "facilitates the creation or recognition of distinct spheres of regulation."[72]

The Act left no doubt as to Congress' intent that there be distinct spheres of regulation – one interstate, the other intrastate. The Court in Louisiana recognized this when it said:

> The Communications Act not only establishes dual state and federal regulation of telephone service, it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system. Thus, the Act itself establishes a process designed to resolve what is known as "jurisdictional separations" matters, by which process it may be determined what portion of an asset is employed to produce or deliver interstate as opposed to intrastate service.[73]

3.1.3 Statutory Authority: The 1934 Communications Act and Its Dual Regulatory Scheme

Prior to the enactment of the Act, on June 19, 1934, Congress had placed control over communications (both wire and wireless) in the hands of several federal agencies under the Radio Act of 1927. The Radio Act had set up an experimental and temporary agency, the Federal Radio

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[70] Smith v. Illinois Bell, 282 U. S. 133 (1930), (hereinafter, Smith).

[71] Id. at 148.

[72] Louisiana, 476 U. S. at 375.

[73] Id. at 375.

Commission[74] to regulate radio. Control over the remaining field of communications was distributed between the Department of Commerce and the ICC (which had been given jurisdiction over telephone and telegraph companies by the Mann-Elkins Act of 1910[75]).

Federal regulation of communications prior to 1934, however, was nominal. The Preliminary Report on Communications Companies, submitted on April 18, 1934, to the U.S. House of Representatives[76] declared:

> At the present time there is little, if any, Federal regulation of the rates, practices, and charges of the several branches of the communication industry. This is, however, not due to any lack of interest or sense of responsibility by the Interstate Commerce Commission; rather it has been due to the absence of an effective mandate from Congress. Congress has not had enough interest in, or information about, the communications companies to respond in a mandate to make inquiries coupled with appropriations sufficient to carry on an investigation.[77]

While federal regulation of communications prior to 1934 was nominal, states set up regulatory commissions with comprehensive intrastate jurisdictional powers.[78] State regulation, however, was subject to

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[74] The temporary status of the Radio Commission proved to be more permanent: its status as a full-time agency was continued on a one-year basis by statutes until 1929, when a law at the end of 1929 provided that the commission continue until otherwise provided by law.

[75] Mann-Elkins Act of 1910, Act of June 18, 1910, 36 Stat. at L. 539.

[76] The Preliminary Report on Communications Companies [H.R. Rep. No. 1273, 73rd Cong., 2d sess. (1934)] submitted on April 18, 1934, pursuant to H.R. Res. 59, 72d Cong., 1st sess. (1932), and H.J. Res. 572, 72d Cong., 2d sess. (1923), (hereinafter, Splawn Report).

[77] Id. at XVI. Quoted from footnote 4 of Wheat, The Regulation of Interstate Telephone Rates, 51 Harvard L. Rev. at 846.

[78] See Wheat, The Regulation of Interstate Telephone Rates, 51 Harvard L. Rev. at 847. Wheat wrote that "prior to 1930 all but three states ... provided themselves with regulatory commissions, clothed with comprehensive intrastate telephone rate jurisdiction."

criticism. Carl Wheat, in his article, "The Regulation of Interstate Telephone Rates," argued that state regulatory efforts during this time were frequently rendered ineffective by the complex nature of the telephone business. This, coupled with the states' limited geographical jurisdiction and the companies' regional and national operations, tied the state commissions' hands.[79]

Against this backdrop of nominal federal regulation of communications, and criticized – but comprehensive – state regulation, the Act was drafted. By most historical accounts, the Act came on the heels of a movement in the early 1930s that looked toward a "more positive occupation of this field [communications]."[80] An extensive congressional investigation of the communications industry was made resulting in the Splawn Report.[81] This report recommended the enactment by Congress of a comprehensive regulatory statute and made the following, still timely, comment as to why regulation of communications was necessary:

> The American people are entitled to know if they are being over-charged for this service [i.e., telephone service] though they may be satisfied with the quality of the service.... The importance of the industry, and the magnitude of its operation call for actual and not nominal regulation. Telephone business is a monopoly – it is supposed to be regulated."[82]

Thus, it was against this backdrop, coming after a considerable investigation into the telephone industry and with the purpose of regulation duly noted in the Splawn Report (as mentioned immediately

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[79] See id.

[80] See id. at 848. See, e.g., the discussion in Constitutional Analysis, supra note 45, at 142. It describes a "'constitutional revolution' of the 1930s," which brought the word "regulate" as contained in the Commerce Clause [which says "Congress shall have power ... to regulate Commerce..."] to prominence (emphasis added).

[81] See supra note 76.

[82] Splawn Report, supra note 76, at page xxxi.

above), that Congress enacted the Act. The Act consolidated regulatory authority over all forms of communications into a new agency, the FCC (the Radio Commission was abolished). The FCC was created for the purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...."[83]

The Act also established dual state and federal regulation of telephone service and recognized "that jurisdictional tensions may arise as a result of the fact that interstate and intrastate service are provided by a single integrated system."[84] These tensions arise over different interpretations of the Act. Regarding the preemption issue, the differences in interpretation arise over the degree of discretion Congress intended the FCC to exercise under the Act.

It was noted by Bernard Schwartz that "[t]he Communications Act represent[ed] the high-water mark of congressional abdication of power to the regulatory agency,"[85] given that its outstanding feature was the unfettered discretion it vested in the FCC. Schwartz considered that "[t]elling the FCC to act in the public interest [wa]s the practical equivalent of saying: 'Here is the regulatory problem; deal with it as you will.'"[86] Schwartz, however, was referring to the public interest test Congress directed the FCC to use in governing its exercise of powers over broadcasting, <u>not telephone service</u>.[87]

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[83] 47 U. S. C. section 151.

[84] <u>Louisiana</u>, 476 U. S. at 375.

[85] Schwartz, <u>The Economic Regulation of Business and Industry, A Legislative History of U.S. Regulatory Agencies</u>, Vol. IV. Edited by Bernard Schwartz, Chelsea House, 1973, at 2374 (hereinafter, <u>Economic Regulation</u>).

[86] <u>Id</u>.

[87] Schwartz was referring to the powers vested in the FCC over broadcasting. These powers were enumerated in Title III of the Act,

The key section of the Act which the Court in Louisiana analyzed as to congressional intent and the section which the FCC attempted to diminish and distinguish using a narrow reading of the section's words and the legislative intent was section 152 (b). The critical provision of this section reads:

> [N]othing in this chapter shall be construed to apply or give to the Commission jurisdiction with respect to (1) charges classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier....[88]

By including section 152 (b), Congress "enacted a complete scheme of regulation...."[89] Where the Court in Hines said that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."[90] The Court in Louisiana demonstrated that proposition held equally to federal agencies which exceeded the authority given them by Congress:

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which prescribes special provisions relating to radio. Specifically, 47 U. S. C. section 303 begins:

> Except as other wise provided in this chapter, the Commission from time to time, as the public convenience, interest, or necessity requires, shall
>
> (a) Classify radio stations;...

Schwartz commented that "[t]he field of radio was still new in 1934 and the Congress felt that there had not been enough regulatory experience to include in the law detailed standards to limit the commission's discretion. In granting a broadcast-station license the FCC need only consider 'if public convenience, interest, or necessity will be served thereby.'" (Id.)

[88] 47 U. S. C. section 152 (b).

[89] Hines v. Davidowitz, 312 U. S. 52, at 66-67 (1941), (hereinafter, Hines).

[90] Id. at 66-67.

> While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, Hines, 312 U. S., at 67, it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.[91]

The FCC is delegated its powers by Congress and has no power to act "unless and until Congress confers powers upon it."[92] The Court in Louisiana examined "the nature and scope of the authority granted by Congress to the [FCC],"[93] and concluded that Congress did not intend that the FCC's regulations displace the states', finding that section 152 (b) constituted "a congressional denial of power to the FCC...."[94]

Although Louisiana literally considered only FCC preemption of state depreciation practices, the strong and express nature of the opinion's interpretation of section 152 (b)'s limitations on FCC power can be applied to argue that the FCC cannot "expand its power in the face of a congressional limitation on its jurisdiction"[95] and preempt state regulation over intrastate telecommunications matters whenever the FCC believes such action "will best effectuate a federal policy."[96]

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[91] Louisiana, 476 U. S. at 374.

[92] Id.

[93] Id.

[94] Id.

[95] Id.

[96] Id. See also NARUC, 880 F. 2d at 429, where the Court of Appeals, D.C. Circuit concluded that "the only limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication. Thus, the FCC may not use its preemptive powers in a manner that would negate the lawful exercise of state authority over intrastate service, as Louisiana PSC illustrates."

Respondents in the case countered that section 151 of the Act should be read to support their position that "state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act."[97] The Court seems to have clearly rejected the respondent's broad reading of section 151[98] as much as it might overcome the express jurisdictional limitations on FCC power contained in section 152 (b). The Court stated:

> By its terms, this provision [section 152 (b)] fences off from FCC reach or regulation intrastate matters — indeed, including matters, "in connection with" intrastate service. Moreover, the language with which it does so is certainly as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC [section 151].[99]

The Court found that sections 151 and 152 (b) were "naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a dual regulatory system to achieve that goal."[100] If the Court had found the sections to be in conflict (which it didn't), it would have favored section 152 (b) over section 151 (i.e., the specific over the general).

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[97] Louisiana, 476 U. S. at 370. This is the Court's summary of the respondents' argument.

[98] The Court rejected the respondents' broad reading of the language of section 151 of the Act that read, "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges...." (47 U. S. C. section 151) The respondents had interpreted this provision of section 151 of the Act to mean "that state regulation which frustrates the ability of the FCC to perform its statutory function of ensuring efficient, nationwide phone service may be impliedly barred by the Act." See Louisiana, 476 U. S. at 369-370.

[99] Louisiana, 476 U. S. at 370.

[100] Id. at 370.

The Court also rejected the FCC's interpretation of the Act's legislative history. The FCC argued that the legislative history of the Act supported a narrow reading of section 152 (b). While all parties and the Court agreed that provisions in the Act were designed to overrule the Shreveport Rate Case, the FCC argued that the application of the Shreveport Rate Case can only be read narrowly to say that the "sole concern of the state commissioners was with 'protection against federal preemption of the states' setting of individual customer charges for specific intrastate service.'"[101]

The Court rejected the FCC's narrow reading of congressional intent. The Court found that the legislative history of the Act revealed "that representatives from the industry and the States were fully aware that what was at stake in the Act were broad powers to regulate, including, but not limited to, the setting of individual rates...." [102]

In sum, the Court soundly rejected the FCC's narrow reading of congressional intent in the Act and instead considered the language in section 152 (b) to be broad, containing "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction ('nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to ... intrastate communication service...')."[103]

3.1.4 Case Law: Post-1934, Pre-Louisiana

After the Act was enacted by Congress and prior to Louisiana, various circuits of the U.S. Courts of Appeals examined the preemption issue in disputes between federal and state regulatory authorities over appropriate telecommunications policy. What follows is an analysis of several of the more important decisions as they apply to Louisiana.

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[101] Id. at 372. This is the Court's summary of the FCC's argument.

[102] Id. at 372.

[103] Id. at 373.

3.1.4.1 North Carolina I and North Carolina II

In North Carolina I and North Carolina II, the Fourth Circuit of the U.S. Court of Appeals upheld FCC preemption of state regulation of customer-provided telephone terminal equipment (CPE). As a result of these decisions, the Court established a two-prong test for FCC preemption of state regulation. The Court in Louisiana stated the test as follows:

> [S]ection 152 (b) applies as a jurisdictional bar to FCC preemptive action only when two factors are present; first, when the matter to be regulated is purely local and second, when interstate communication is not affected by the state regulation which the FCC would seek to preempt."[104]

The respondents in Louisiana cited North Carolina I and North Carolina II as authority to support their contention that FCC preemption should be upheld in Louisiana. But the Court in Louisiana characterized the two-prong test as "misrepresent[ing] the statutory scheme and the basis and test for preemption."[105] The dissents in North Carolina I and North Carolina II foreshadowed the Louisiana holding by recognizing the viability of the jurisdictional distinctions drawn in section 152 (b). Both dissents, written by Judge Widener, reject the two-prong test on jurisdictional grounds based on congressional intent of the Act and on basic principles of administrative law which require an agency to justify its decision with a reasoned analysis and finding of facts which support the decision.

In North Carolina I, Judge Widener argued that "the intent of Congress was to establish a regulatory scheme for telephone companies, which envisioned a system of divided jurisdiction, Federal or State, rather than a system of primary jurisdiction, Federal then State, and that the jurisdiction of the State regulatory authorities was intended to be regulated by Congress, not by the whim of the Federal

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[104] Id. at 374.

[105] Id.

Communications Commission."[106] In North Carolina II, Judge Widener reiterated his position that the FCC had encroached "upon the regulatory sphere reserved by Congress to the States."[107]

While Widener's dissent was a stinging attack on the preemptive actions of the FCC in North Carolina I and North Carolina II, the Supreme Court's rejection of FCC preemption in Louisiana was a cautionary warning. While the Court did not reject the basic tenet "that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress,"[108] it cautioned the FCC for exercising power it did not have to exercise in the first place.

Balanced against the basic tenet of preemption, the Court in Louisiana said that "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority."[109] The Court then set out two reasons to justify this proposition:

> First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency."[110]

The Court read section 152 (b) to constitute a congressional denial of power to the FCC. In view of this express congressional limitation on the scope of the FCC's authority, the Court concluded that it "[could

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[106] North Carolina I, 537 F. 2d at 798.

[107] North Carolina II, 552 F. 2d at 1056.

[108] Louisiana, 476 U. S. at 374.

[109] Id.

[110] Id.

not] accept an argument that the FCC [could] nevertheless take action which it thinks [would] best effectuate a federal policy."[111] By ignoring the express jurisdictional limitations contained in section 152 (b), the FCC was conferring power on itself to preempt state regulation. The Court's clear warning to what it saw as FCC pursuit of its own policies in the face of congressional limitations was that "[to] permit an agency to expand its power in the face of congressional limitation on its jurisdiction would be to grant to the agency power to override Congress."[112]

3.1.4.2 California

In California, FCC preemption of state regulation of telecommunications facilities was upheld by the U.S. Court of Appeals, D.C. Circuit. The D.C. Circuit concluded that the FCC preemptive action was proper because it was technically and practically difficult to separate the facilities for the purposes of intrastate versus interstate communications regulation "and that inconsistent state regulations could frustrate the congressional goal of developing a "unified national communications service."[113]

The dissent in this case was written by Judge Spottswood W. Robinson III.[114] Judge Robinson examined the legislative intent of the critical section of the Act which limits the power of the FCC – section 152 (b). He distinguished the "spate of cases upholding Commission ouster of state regulation"[115] (a list which includes North Carolina I) not only on the grounds that many of them dealt with the FCC's "significantly wider powers over broadcasting"[116] but also that FCC preemption was

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[111] Id.

[112] Id. at 374-375.

[113] California, 567 F. 2d at 86.

[114] For text of dissent, see California, 567 F. 2d at 87-90.

[115] California, 567 F. 2d at 89.

[116] Id. at 89, footnote 23.

appropriate in those cases because the facilities were "'used in common and indivisibly' for intrastate and interstate service"[117] or served "vital national functions and [there were] no substantial and important local capabilities."[118]

Judge Robinson's interpretation of the legislative intent of section 152 (b) was to consider it a "sensitive balancing ... of federal and state concerns ... [which] counsel departure from the legislative model of concurrent jurisdiction over facilities devoted to both kinds of traffic only when conflict between exercises of federal and state power is for all practical purposes 'unavoidable.'"[119] Judge Robinson's test for unavoidability was that the FCC preemption must be supportable with specific findings as to the imperativeness of the preemption.[120] He found none in California. He found the record of the case to be "devoid of any evidentiary basis for [FCC] assertion [of jurisdiction]."[121]

The majority did not address Judge Robinson's proposition that preemption was proper only when exercises of federal and state power would result in unavoidable conflict.[122] The majority, instead, relied

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[117] Id.

[118] Id.

[119] Id.

[120] This specificity requirement was made part of the preemption analysis by the Court of Appeals, D.C. Circuit in NARUC, Illinois, and ARCO. In Illinois, the Court explained that it had remanded the case in NARUC for further proceeding "because the Commission [the FCC] had not convincingly explained how [state regulation] would necessarily thwart [the FCC's legitimate objective]...." (Illinois, 883 F. 2d 104 at 115)

[121] Id. at 90.

[122] This principle that preemption is only proper when conflict arises from the exercise of federal and state power foreshadows a portion of the D.C. Circuit's preemption analysis based on Louisiana in NARUC, Illinois Bell, and ARCO. In those three cases, the D.C. Circuit found that under Louisiana, preemption could be considered only when the subject of the FCC's regulation could not be separated into interstate and intrastate components. This analysis is discussed in greater detail in chapter 3, section 3.2.2, which examines the NARUC, Illinois Bell, and ARCO cases.

on a broad reading of section 151 of the Act to give the FCC extensive powers to preempt "inconsistent state regulations [that] could frustrate the congressional goal of developing a 'unified national communications service.'"[123] Such a broad reading of section 151 of the Act was rejected in Louisiana.[124]

3.1.4.3 CCIA v. FCC

In CCIA v. FCC, the U.S. Court of Appeals, D.C. Circuit, upheld FCC preemption of state regulation of combined data processing and communications services and CPE. The FCC rulemaking under review was known as Second Computer Inquiry, or Computer II.[125]

Computer II was preceded by Computer I,[126] begun in 1966 and culminating in 1971 with adoption by the FCC of rules describing the conditions under which computer use by common carriers constituted common carrier communication subject to regulation under Title II of the Act. Computer II was followed by Computer III.[127] The Computer III

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[123] California, 567 F. 2d at 86. Here the Court agrees with the FCC and quotes from the FCC order, 56 FCC 2d at 20.

[124] See supra note 98.

[125] The FCC orders comprising Computer II which were under review in CCIA v. FCC were as follow: Final Decision, In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), (hereinafter, "Computer II Final Decision"); Memorandum Opinion and Order, In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 84 FCC 2d 50 (1980), (hereinafter, "Computer II Reconsidered Decision");and Memorandum Opinion and Order on Further Reconsideration, In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 88 FCC 2d 512 (1981), (hereinafter, "Computer II Further Reconsidered Decision").

[126] See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Tentative Decision, 28 FCC 2d 291 (1970); Final Decision and Order, 28 FCC 2d 267 (1971) aff'd sub nom. GTE Service Corp. v. FCC, 474 F. 2d 724 (Second Cir. 1973); decision on remand, 40 FCC 2d 293 (1973), (hereinafter, Computer I).

[127] Computer III or the "Third Computer Inquiry" was a two-phase FCC proceeding wherein the following FCC orders were issued: Amendment of Sections 64.702 of the Commission's Rules and Regulations, Report and

decision is currently on appeal before the U.S. Court of Appeals, Ninth Circuit (referred to earlier in this paper as the Computer III Appeal). The Computer III Appeal is discussed in chapter 4.

The FCC in Computer II "adopted a new regulatory definitional scheme with two service categories: basic and enhanced."[128] Basic service was defined "as limited to 'the common carrier offering of transmission capacity for the movement of information.'"[129] Under its new scheme of regulation, the FCC "continued to require common carriers to provide basic transmission services under tariff on an equal basis to all customers."[130] "The Commission found that enhanced services and CPE were not within the scope of its Title II jurisdiction but were within its ancillary jurisdiction."[131] Enhanced services were defined by the FCC as "'any offering over the telecommunications network which is more than a basic transmission service.'"[132]

Order, (CC Docket No. 85-229), 104 FCC 2d 958 (1986), (hereinafter, Phase I Order), modified on reconsideration, 2 FCC Rcd 3035 (1987), (hereinafter, Phase I Reconsideration Order), recon. denied, 3 FCC Rcd 1135 (1988), (hereinafter, Phase I Further Reconsideration); 2 FCC Rcd 3072 (1987), (hereinafter, Phase II Order), 3 FCC Rcd 1150 (hereinafter, Phase II Reconsideration). As part of the Computer II proceeding, the FCC also issued Open Network Architecture Plans, Memorandum and Opinion and Order, 4 FCC Rcd 1 (1988).

[128] Id. at 968.

[129] Id.

[130] Id.

[131] CCIA v. FCC, 693 F. 2d at 205. Here the Court is referencing the Computer II Final Order, 77 FCC 2d at 431-35, 450-452.

[132] Report and Order, 104 FCC 2d at 968.

The FCC more specifically defined enhanced services in its rules:

> [T]he term "enhanced service" shall refer to services, offered over common carrier transmission facilities, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's additional, different or restructured information; or involve subscriber interaction with stored information.[133]

The FCC also determined that enhanced services were "truly competitive,"[134] and "regulation of the enhanced services was unwarranted" because "consumers were deriving substantial benefits from [the enhanced services] competition."[135] Finally, the FCC "concluded that the basic and enhanced service dichotomy advanced the public interest by promoting regulatory certainty and by comporting with the actual development of the enhanced services industry."[136] The dichotomy served the FCC's interest to quickly move an indiscrete component of telecommunication services[137] out of intrastate regulation without substantial economic analysis and evidentiary basis to demonstrate that the decision served the public interest. Although the FCC had extensive notice and comment cycles in all its Computer II proceeding, in the end, the FCC simply chose not to exert its Title II regulatory powers over enhanced services.

The FCC argued that "enhanced services, communications and data processing technologies have become intertwined so thoroughly as to produce a form different from any explicitly recognized in the

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[133] Id., quoting from Section 64.702 (a) of the Commission's Rules, 47 CFR § 64.702 (a).

[134] Report and Order, 104 FCC 2d at 968.

[135] Id.

[136] Id.

[137] The FCC unsuccessfully attempted to "identify a discrete communications component ... in what [it] finally c[a]me to label 'enhanced service.'" (77 FCC 2d at 430)

Communications Act."[138] This decision not to regulate under the Act provided the FCC with a convenient preemption theory: if enhanced services were not common carrier services, the question of state regulation was moot because state jurisdiction under section 152 (b) only applied to common carrier services.[139]

The question of enhanced services and the FCC preemption method of removing enhanced services from Title II regulation did not reach the Court in Louisiana. However, the FCC's scheme to deregulate enhanced services and justify preemption on the basis that the service is no longer subject to common carrier regulation under Title II may have

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[138] 77 F.C.C. 2d at 430.

[139] The D.C. Circuit Court in CCIA v. FCC, 693 F. 2d 198, did not specifically address the reasonableness of the FCC's method of preempting state regulation of enhanced services. The Court concluded that the FCC determination that enhanced services were not "common carrier communications activities [w]as reasonable and amply supported ... [and] based upon intensive study of a rapidly changing and highly technical field and was informed by the comments of a large number of participants in the communications and data processing industries" (CCIA v. FCC, 693 F. 2d at 210). Although the Court "affirmed the [FCC's] decision in its entirety" (id. at 203) and "uph[e]ld the Computer II scheme" (id. at 214), it never specifically addressed FCC preemption of intrastate enhanced services, unlike its extensive treatment of the FCC preemption of intrastate customer premises equipment (CPE).

In NARUC, 880 F. 2d 422, the D.C. Circuit, basing its conclusions on the principles of Louisiana, rejected the FCC's attempt to preempt state regulation by declaring an activity no longer subject to Title II regulation. The FCC had argued in NARUC that "state authority over inside wiring must be preempted as the costs of the wiring are not severable; they are not severable because they are no longer subject to the jurisdictional separations process; but the costs are not subject to the separations process because inside wiring has been preemptively deregulated" (NARUC, at 429; this is the Court's characterization of the FCC's position). The Court rejected this circular reasoning, concluding that "[w]ere we to accept this argument, the [FCC] would have unchecked authority to force state deregulation of any activity it chose to deregulate at the interstate level. The D.C. Circuit, however, distinguished its findings in NARUC from those in CCIA v. FCC. See NARUC, 880 F. 2d 422 at 431.

been, in hindsight, an abuse of the FCC's authority under the Court's findings in Louisiana.[140]

3.2 FEDERAL PREEMPTION: POST-LOUISIANA

3.2.1 The Standard of Review Established by Louisiana to Apply in Future Controversies Involving FCC Preemption

The FCC would argue that Louisiana stands only for the proposition that section 152 (b) of the Act acts as a bar to federal preemption of state regulation over depreciation of dual jurisdictional property.[141] This argument, however, is based on the FCC's narrow reading of the case law, its narrow interpretation of legislative intent regarding statutory authority and inappropriate applications of the Supremacy and Commerce Clauses.

Since Louisiana was decided, several scholarly articles have been written on the case that examine its findings and attempt to suggest its precedential value for future preemption controversies. Initially, the case law preceding Louisiana[142] did not flesh out any more specific

[140] The D.C. Circuit, in NARUC, 880 F. 2d 422 at 431, basing its conclusions on Louisiana, rejected such circular reasoning and cautioned the FCC that inseparability did not automatically make preemption a fait accompli: to preempt based on inseparability alone would exceed the FCC's authority. Under its interpretation of Louisiana, the D.C. Circuit held that once inseparability was demonstrated, the FCC had the additional burden of "showing that the state regulation negates a valid federal policy." (NARUC at 431) The Court found that "[t]he FCC [had] met this burden in CCIA." (Id.)

[141] See Brief for Federal Communications Commission in the Computer III Appeal, at 33 (hereinafter, "FCC Brief"). There, the FCC contended that Louisiana is limited in that it only considered the impact of section 152 (b) as "applied to services that undeniably were intrastate common carrier services. The Court in that case [Louisiana] has held that Section 2 (b) (1) withholds FCC jurisdiction over the regulation of depreciation rates for intrastate telephone service, that depreciation rates for intrastate services were severable from depreciation rates for interstate services under the FCC's cost separations procedures and that the FCC thus had no authority to preempt state regulation of such rates."

[142] The case law referred to here is Hawaiian Tel. Co. v. Public Utilities Comm'n, 827 F. 2d 1264 (Ninth Circuit 1987), pet. for cert.

preemption standard from Louisiana than, as a general principle, FCC attempts to preempt state regulation are barred by section 152 (b).[143] Then, in 1989, in a string of three cases issued within a four-month period, the D.C. Circuit Court of Appeals fashioned a more specific preemption analysis based on Louisiana.[144] The present literature on Louisiana and post-Louisiana case law is reviewed below.

3.2.1.1 A review and comment on current literature on Louisiana

After Louisiana was decided, a spate of short articles analyzing the decision from various perspectives was published in the regulatory trade presses, but only a few articles have been published in legal periodicals. The following is a brief review and analysis of the articles on Louisiana appearing in legal periodicals.

- **"Preemption Reversed: The Supreme Court's Decision in Louisiana Public Service Commission v. FCC"[145]**

In his article entitled "Preemption Reversed: The Supreme Court's Decision in Louisiana Public Service Commission v. FCC," Richard McKenna, an attorney for GTE Service Corporation, argued that Louisiana leaves some ambiguities – particularly with regard to the application of the two-prong preemption test of North Carolina I and North Carolina II. McKenna attempted to justify his proposition that the opinion is ambiguous by arguing that footnote 4 of the opinion holds open a window to "federal action preempting the states as to unidentified controversies in the near or distant future."[146]

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pending, No. 87-1152 (filed Jan. 9, 1988) and FM Subcarrier, 798 F. 2d 1515 (D.C. Cir. 1986).

[143] See FM Subcarrier, 798 F. 2d at 1520.

[144] The three cases were NARUC, 880 F. 2d 422 (D.C. Circuit 1989); Illinois Bell, 883 F. 2d 104 (D.C. Circuit 1989); and ARCO, 886 F. 2d 1325 (D.C. Cir. 1989).

[145] Supra note 13.

[146] McKenna, supra note 13 at 52. Footnote 4 of Louisiana reads: "Thus, these cases [the Court is referring to the depreciation cases] are readily distinguishable from those in which FCC pre-emption of state regulation was upheld where it was not possible to separate the

Notwithstanding footnote 4, the Court, in Louisiana, characterized the two-prong test of North Carolina I and North Carolina II as misrepresenting "the statutory scheme and the basis and test for preemption."[147] This is not a ringing endorsement of the two-prong test nor is it an ambiguous statement on the Supreme Court's view of the application of the two-prong test in future controversies.

The Court also does not leave intact the two-prong test by its insertion of footnote 4. Rather, the Court sets exacting criteria of when the two-prong test can be applied: where Congress has given the FCC the power to act. Footnote 4 must be read in the context of Louisiana's principal proposition: that "a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority"[148]; that is, the FCC may preempt state regulation of telecommunications only where the FCC can overcome the limitations on its power imposed on it by the Court's interpretation of section 152 (b).[149]

These restrictions on the FCC's powers, particularly when read in conjunction with the Court's characterization of section 152 (b)'s

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interstate and the intrastate components of the asserted FCC regulation. [The Court then cites North Carolina I and North Carolina II.]" (Louisiana, 476 U. S. at 375, n. 4)

[147] Louisiana, 476 U. S. at 374.

[148] Id.

[149] See id. at 370. The Court said that "[b]y its terms, this provision [§ 152 (b)] fences off from FCC reach or regulation intrastate matters — indeed, including matters 'in connection with' intrastate service."

The D.C. Circuit, in the NARUC, Illinois Bell, and ARCO cases, refines the Louisiana principles into a preemption analysis which says that 152 (b) bars federal preemption of state regulation where the issue is jurisdictionally separable; where separability is not possible, the FCC may preempt state regulation in an area of telecommunications "only to the extent that such regulation negates federal policy [in that same area of telecommunications]" (NARUC, 880 F. 2d 422 at 431) and the FCC must convincingly "explain how state [regulation] would necessarily 'thwart the FCC's legitimate objective.'" (Illinois Bell, 883 F. 2d 104 at 115, quoting from NARUC, at 430)

express jurisdictional limitations on FCC power[150] and the Court's rejection of the argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy[151] are not ambiguous, but are powerfully explicit, direct, and clear.

- **"Federal Preemption of Conflicting Telecommunications Regulations"[152]**

In her article "Federal Preemption of Conflicting Telecommunications Regulation," Laura Philips argued that Louisiana "did not fatally implicate the Commission's approach in asserting jurisdiction based upon an inquiry into the impact of an activity on the provision of interstate service when confronted with state discrimination against interstate communications or other provisions which can impede interstate communications."[153]

She found Louisiana to be "spiritually at odds with its [the Supreme Court's] more sophisticated approach in allowing federal preemption based on ancillary jurisdiction only two years before in Capital Cities."[154] She distinguished the two by pointing out that Capital Cities involved retransmissions of cable television signals which she considered clearly falling under the FCC's ancillary jurisdiction, while Louisiana involved an area traditionally dominated by the states — depreciation — and one which can be readily separated for dual jurisdictional regulatory purposes.

She believed, however that the net effect of Louisiana on future preemption doctrine is not yet clear and the "peg upon which any

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[150] Louisiana, 476 U. S. at 374.

[151] Id.

[152] Philips, "Federal Preemption of Conflicting Telecommunications Regulations," 7 Glendale L. Rev. 141.

[153] Id. at 147-148.

[154] Id. at 159, citing Capital Cities Cable, Inc. v. Crisp, 467 U. S. 691 (1984), (hereinafter, Capital Cities).

reviewing court will hang its hat will be either an expansive or restrictive reading of Sections 2 (b) and 221 (b)."[155] A more expansive reading, she believed would "create a direct conflict with Section 2 (a) and section 1 of the Act, leaving the balance of dual regulation again at a stalemate."[156] Section 1 of the Act[157] describes the general purpose of the statute and the FCC's duty to regulate "interstate and foreign commerce in communication by wire and radio so as to make available ... a rapid, efficient, nationwide ... wire and radio communications service with adequate facilities at reasonable charges."[158]

The Court's opinion, however, permits neither an expansive nor restrictive reading of the statute, but rather an exact reading of section 152 (b) such that if a conflict existed between section 152 (b) and Section 1 of the Act, section 152 (b) would prevail.[159]

- **"Affordable Rates: The Case Against FCC Preemption of Telephone Depreciation"[160]**

Marilyn R. Stahl's "Affordable Rates: The Case Against FCC Preemption of Telephone Depreciation" was written after the Fourth Circuit in Virginia upheld the FCC's preemption of state regulation of intrastate depreciation rates. Stahl recommended that the Supreme Court overrule the Virginia decision and establish a more stringent test for reviewing FCC preemption. The author argued that because the Act provides for joint regulation of telecommunications, there should be a

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[155] Id. at 148.

[156] Id. at 166.

[157] 47 U. S. C. section 151.

[158] Id.

[159] See Louisiana, 476 U. S. at 370, where the Court finds section 152 (b) to be controlling were a conflict be found to exist between it and a more general provision of the Act.

[160] Note, "Affordable Rates: The Case Against FCC Preemption of Telephone Depreciation," 35 Am. U. L. Rev. 545.

strong presumption that state regulations are valid. By emphasizing the restrictive nature of section 152 (b) as it applies to the FCC's preemption discretion and the power that section reserves to the states, the Court in Louisiana implied that where federal and state regulatory policies conflict there should always be a strong presumption that the state policies prevail.

- **"The Law and Economics of Federalism in Telecommunications"[161]**

In their article entitled "The Law and Economics of Federalism in Telecommunications," John R. Haring and Kathleen B. Levitz, both FCC staffers at the time the article was written, suggested that Louisiana, initially, forced the FCC to be more cautious in its approach to preemption. The authors further suggested, however, that later, after the initial reactions had passed, the FCC concluded that Louisiana was "less of a limitation than first believed" and that footnote 4 of the opinion provided "the flexibility [the FCC] needed to continue preempting state regulations which conflict[ed] with major federal policy initiatives."[162]

Footnote 4, however, is less an invitation to future preemption possibilities than it is a component of Louisiana's preemption analysis. Footnote 4 allows for the possibility that preemption will not be barred under 152 (b) only if it can first be shown that "it was not possible to separate the interstate and the intrastate components of the asserted FCC regulation."[163]

The authors also suggested that the preemption analysis in Louisiana "appeared to take a less economically efficient approach to statutory interpretation[],"[164] rather than using a traditional "public interest,"

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[161] Haring, John R., and Kathleen B. Levitz, "The Law and Economics of Federalism in Telecommunications," 41 Fed. Com. L. J. 262.

[162] Id. at 313.

[163] Louisiana, 476 U. S. at 375, n. 4.

[164] Id. at 264.

"gap-filler" approach to statutory interpretation. According to the authors, the decision in Louisiana – unlike earlier courts' decisions – was inconsistent with economic efficiency, and its application in future federal-state preemption disputes "may well lead to outcomes inconsistent with the goals of telecommunications regulation."[165]

The authors, however, fail to articulate whose "goals" it is they refer to. The tensions in the federal-state jurisdictional dispute arise precisely because there is disagreement over the policy goal to be achieved. A policy goal of the state regulators which is entirely at odds with federal policy goals may be entirely appropriate for state interests. Rather than leading to outcomes inconsistent with telecommunications policy goals, Louisiana, as its predecessor cases have shown,[166] permits outcomes that allow the FCC to achieve a legitimate policy goal while minimizing federal intrusion on state regulatory authority.

3.2.2 Application of the Louisiana Standard of Review: A Review and Analysis of Case Law Post-Louisiana

3.2.2.1 Hawaii[167]

In a decision made on September 11, 1987, after Louisiana was decided, the U.S. Court of Appeals, Ninth Circuit, upheld a lower court injunction to enforce an FCC order preempting an order of the Hawaiian Public Utilities Commission (PUC). The Hawaii PUC had established intrastate rates which had the effect of applying a separations procedures for the allocation of costs and investments between interstate and intrastate telephone service which were independent of FCC required separations.

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165 Id.

166 See NARUC, 880 F. 2d 422; Illinois Bell, 883 F. 2d 104; and ARCO, 886 F. 2d 1325.

167 Hawaiian Tel. Co. v. Public Utilities Comm'n, 827 F. 2d 1264 (Ninth Circuit), pet. for cert. pending, No. 87-1152 (filed Jan. 9, 1988), (hereinafter, Hawaii).

The majority found that Louisiana supported its "conclusion that the FCC separations procedures authorized by section 410 (c) of the Act bind the states, and that section 152 (b) does not stand in the way."[168] The majority stated that "[t]he Supreme Court made it quite clear in Louisiana Public Service that federal separations procedures were an essential prerequisite to the creation of independent spheres of federal and state power over communications...."[169]

In his dissent, Judge Ferguson argued that the majority misconstrued and misapplied Louisiana. Ferguson concluded that Louisiana stood "for the proposition that an agency may not expand its jurisdiction beyond that granted by Congress, regardless of the policy arguments that the agency may make in support of greater preemptive power."[170]

Hawaii was not a significant case regarding the application of Louisiana because Louisiana really didn't apply to the underlying issue in Hawaii. The issue in Hawaii was whether the Hawaiian PUC had the authority to use separations procedures different from those established and required by the FCC and applicable to all states. The Louisiana decision did not affect the answer to that question. The Act by itself provides the answer.[171] Louisiana only served to clarify that FCC separations are necessary to the "creation or recognition of distinct spheres of regulation."[172]

3.2.2.2 FM Radio Subcarrier

In this case, the U.S. Court of Appeals, D.C. Circuit, overturned FCC preemption of state regulation and looked to the Louisiana decision for

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[168] Hawaii, 827 F. 2d at 1276.

[169] Id. Here, the opinion quotes from Louisiana, 476 U. S. at 375.

[170] Id. at 1279.

[171] See 47 U. S. C. Sections 221 (c) and 410 (c).

[172] Louisiana, 476 U. S. at 375. The Court pointed out that "the Act itself establishes a process designed to resolve what is known as 'jurisdictional separations' matters...." (Id.)

guidance as to the resolution of the case.[173] The Court had some sympathy for the FCC,[174] but it concluded that "[w]hatever the merit of the Commission's policy arguments for unimpeded entry and free market competition in order to facilitate the beneficial utilization of scarce spectrum resources, the attempted preemption of state regulation in this case contravenes section 152 (b)."[175] There was no dissent in this case.

3.2.2.3 NARUC[176]

In three cases decided within four months of one another in the summer and early fall of 1989, the U.S. Court of Appeals, D.C. Circuit, refined and clarified the preemption standard established in Louisiana. These three cases were NARUC, Illinois Bell, and ARCO.[177] In NARUC, which was decided on July 7, 1989, the petitioners representing state regulatory interests challenged the authority of the FCC to preempt state regulation of the installation and maintenance of telephone inside wiring used to carry both interstate and interstate calls. The FCC's preemption order had been issued after the Louisiana decision and was an affirmation of its preemption decision on further reconsideration.[178] The Court did not uphold the preemption, but remanded the case to the FCC for further proceedings.

In its decision on further reconsideration, "the FCC [had] reaffirmed that inside wiring should not be regulated as a common carrier service,... rejected the argument that section 152 (b) reserves

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[173] FM Radio Subcarrier, 798 F. 2d at 1518.

[174] Id. at 1520. The Court states: "Public interest considerations may well favor changing the present rules and allowing more complete FCC control over intrastate radio common carriage. This decision, however, must be made by Congress, not by the FCC, and not by the courts."

[175] Id. at 1520.

[176] NARUC, 880 F. 2d 422 (D.C. Cir. 1989).

[177] Supra, note 15.

[178] See Memorandum Opinion and Order, 3 FCC Rcd 1719 (1988), (hereinafter, Further Recon. Order).

jurisdiction to the states over non-common carrier activities that are provided 'for or in connection with' intrastate common carrier activities, and ... reiterated that its decision to preempt was independently justified by the inseverability of jointly used wiring."[179]

The Court found that Louisiana controlled the instant case and "establishe[d] the governing principles for interpreting section 152 (b)."[180] The Court found that under Louisiana, 152 (b) applies to "all intrastate communications services, both common carrier services, and those offered 'for or in connection with' a common carrier service."[181] Inside wiring fell into the latter category and thus was covered by 152 (b). Chastising the FCC, the Court said "we cannot countenance the Commission's attempt to rewrite the statute."[182]

The Court also rejected the FCC's broad position that when physical facilities are inseparable, preemption is justified. The FCC had argued that "because it preemptively detariffed inside wiring installation and maintenance, the costs of those services [were] no longer subject to jurisdictional separation and thus the process relied upon by the Court in Louisiana PCS is inapplicable."[183] The Court found this reasoning to be circular and would give the FCC "unchecked authority to force state deregulation of any activity it chose to deregulate at the interstate level."[184]

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[179] NARUC, 880 F. 2d 422 at 427, quoting from Id.

[180] NARUC, 880 F. 2d 422 at 427.

[181] Id. at 428.

[182] Id.

[183] Id.

[184] Id. at 429.

The Court summarized the Louisiana standard as "the only limit that the Supreme Court has recognized on a state's authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communications."[185] The Court concluded that the FCC could "take appropriate measures in pursuit of [its] goal[s], but only to the degree necessary to achieve it."[186] The Court, guided by Louisiana, required the FCC to narrow its preemption activities to achieve only "valid federal policy"[187] and minimize the impact on state regulatory authority.

This is not a very specific standard and leaves room for interpretation. For instance, who's to say what is the minimal amount of federal preemption necessary to achieve a valid federal policy objective, and who's to say what is a valid federal policy objective? The Court shed additional light on its post-Louisiana preemption analysis in Illinois Bell.

3.2.2.4 Illinois Bell[188]

Illinois Bell was decided on August 1, 1989. In this case, the Ameritech Operating Companies – the parent company of five local Bell Operating Companies (BOCs), including Illinois Bell Telephone Company – sought review of an FCC order[189] which Ameritech argued preempted state regulatory authority. The issue of preemption was the imposition of sales agency requirements on the Bell Operating Companies by the FCC which affected the BOCs' marketing independence.

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[185] Id.

[186] NARUC, 880 F. 2d 422 at 430.

[187] Id. at 431.

[188] Illinois Bell, 883 F. 2d 104.

[189] The FCC order was Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, 2 FCC Rcd 148, 156 (1987).

3.2.2.5 ARCO[202]

In ARCO, the D.C. Circuit appears to add a fourth part to the three-part preemption analysis suggested by its decision in Illinois Bell. ARCO, decided by the D.C. Circuit on September 22, 1989, and amended on September 22, 1989, involved a challenge to an FCC order preempting the Texas Public Utility Commission's decision to prohibit a local telephone company from providing service to a customer located in another local telephone company's service area.

The Court found itself, once again "explor[ing] the contours of the FCC's authority to pre-empt state regulation based on the inseparability doctrine [of] Louisiana."[203] The Court reiterated the positions it had taken in NARUC and Illinois Bell. Although the Court upheld preemption, it clarified further the point it had made in NARUC and Illinois Bell that "even when the equipment that the FCC wishes to regulate is used inseparably and interchangeably for intrastate and interstate calling, the FCC must limit its regulation to the interstate aspects if it can do so."[204]

The fourth part of the preemption analysis which seems to appear in the ARCO decision is that once the subject matter has been evaluated and has passed the first three parts of the analysis, for preemption to be upheld, the FCC must have, "based on the record before it, [determined whether the FCC's order] could have been narrowed and yet still achieved the asserted federal policy ... without encroaching on [a state's regulatory authority]."[205]

A finding that a narrowing of the FCC order was not possible, however, would not preclude preemption if the FCC could adequately explain why preemption was warranted (prompting a revisit of the second

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[202] ARCO, 886 F. 2d 1325.

[203] Id. at 1331.

[204] Id. at 1333.

[205] Id.

The specific service mentioned as being marketed was Centrex, a business service that provides business with intra-office switching functions. The switching is done through a local telephone company's central office. Centrex is an alternative to private branch exchange (PBX) service, which is located on the customer's premise and provides intra-office switching capabilities. "In addition, the FCC preempted states from imposing structural separation requirements or any other regulations inconsistent with the FCC's non-structural safeguards."[190]

Ameritech argued that "Louisiana PSC insulate[d] from the Commission's reach services of a purely intrastate character like Centrex."[191] The Court, finding guidance from Louisiana, resolved the preemption question in favor of the FCC. A reading of the opinion in Illinois Bell suggests that the Court fashioned a three-part preemption analysis "guided in large measure by ... Louisiana...."[192]

Under the first part of the Court's preemption analysis it must be determined whether the subject of dispute is separable into interstate and intrastate components. The Court found preemption to be valid only "'where it is not possible to separate the interstate and the intrastate components of the ... FCC regulation' involved."[193] However, even if the first part of the analysis concludes that separation is not possible, inseparability alone cannot justify preemption. The Court found that "as the FCC concedes, however, the fact that Centrex and like services support interstate as well as intrastate communications does not necessarily authorize preemptive federal regulation of the intrastate aspects of those services."[194]

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[190] Illinois Bell, 883 F. 2d 104 at 108.

[191] Id. at 113.

[192] Id.

[193] Id. where the Court quotes from Louisiana; 476 U. S. at 375, n. 4.

[194] Illinois Bell, 883 F. 2d 104 at 114.

Once inseparability is established, the second part of the analysis requires the FCC to convincingly explain how a state action would thwart a federal regulatory objective.[195] Then, the third part of the analysis requires the FCC to establish that the FCC's stated objective is valid.[196]

A critical element of the first part of the Illinois Bell preemption analysis is that under NARUC, the FCC cannot deem a service inseparable because it declined to exercise Title II regulation over the service.[197] The specificity requirement of the second and third parts of the analysis seems clear from the Court's review of what it did just a month earlier in NARUC. The Court said that it had remanded that case because "the Commission [the FCC] had not convincingly explained how state [tariffing] would necessarily 'thwart [the FCC's legitimate objective] of a free and competitive inside wiring market.'"[198]

The Court found that the FCC had met the burden of its preemption analysis in the Illinois Bell case.[199] The Court agreed with the FCC "that there [was] no practical way to divide the subject matter of [its] regulatory program,"[200] "that the [FCC had] adequately explained its preemption order[,] and that [n]o one question[ed] the legitimacy of the FCC's stated objective."[201]

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[195] Id. at 115.

[196] Id.

[197] See NARUC, 880 F. 2d 422 at 429.

[198] Illinois Bell at 115, quoting from NARUC at 430.

[199] Illinois Bell, 883 F. 2d 104 at 115.

[200] Id. at 116.

[201] Id. at 115.

and third parts of the preemption analysis).[206] Thus, as ARCO suggests, the fourth part of the preemption analysis, while not foreclosing the ability of the FCC to preempt state regulation, forces the FCC to be more careful where and how it chooses to preempt state regulation.

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[206] The Court in ARCO upheld FCC preemption even though the FCC had determined that a narrower preemption order was not feasible in the case. See ARCO, 886 F. 2d at 1333.

CHAPTER FOUR

LOUISIANA'S IMPLICATIONS FOR FUTURE CONTROVERSIES OVER THE FEDERAL/STATE RELATIONSHIP IN TELECOMMUNICATIONS REGULATION: THE COMPUTER III APPEAL

The U.S. Court of Appeals, D.C. Circuit, in exploring the contours of FCC preemption with guidance from Louisiana in NARUC, Illinois Bell, and ARCO, seems to have crafted a relatively clear four-part preemption analysis out of the Louisiana decision. The analysis is summarized as follows. First, preemption is possible only when the disputed regulatory subject cannot be separated into interstate and intrastate components. Second, if separation is not possible, then preemption is valid only when the FCC can explain convincingly how a state action would thwart a federal regulatory objective. Third, the federal regulatory objective must be valid and legitimate. Fourth, and finally, the FCC must examine whether its preemptive action is as narrow as it can be to achieve the FCC's objectives and still intrude as little as possible on state regulatory authority.

The four-part preemption analysis can be used to suggest how the Computer III Appeal, now under review by the Ninth Circuit Court of Appeals, should be decided.

4.1 THE FCC COMPUTER III DECISION

In Computer II, the FCC established structural separation requirements to safeguard the provision of FCC-determined competitive enhanced services by the divested Bell Operating Companies (the BOCs) and American Telephone and Telegraph Company (AT&T) in the regulated and unregulated telecommunications market. Structural separations meant setting up subsidiaries for the provision of enhanced services which were separate from the subsidiaries used to provide regulated monopoly services.[207]

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[207] See Report and Order, 104 FCC 2d, at 963.

The FCC found, however, that the costs of the structural separations requirements outweighed the benefits these requirements were designed to produce: namely, preventing cross-subsidization and discrimination between regulated monopoly services and unregulated competitive services. In Computer III, the FCC replaced the structural separation safeguards of Computer II with nonstructural safeguards for the enhanced service offering of AT&T and the BOCs. The FCC maintained the existing basic and enhanced services categories and imposed new requirements, Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA). The FCC characterized these new phrases as the "principal conditions on the provision of unseparated enhanced services."[208]

4.2 THE APPEAL BY STATE REGULATORS

A group of state regulatory commissions[209] and NARUC filed an appeal of Computer III before the U.S. Court of Appeals, Ninth Circuit, on January 14, 1988. The Computer III decision was appealed on the grounds that the FCC's action unlawfully preempted states' authority to regulate enhanced telecommunication services. The petitioners contended that the FCC's "decision should be overturned because its ignores Section 152 (b) of the 1934 Communications Act ... [and because] it flatly ignores ... [the Louisiana decision which reaffirmed] Congress' intent that the FCC pursue its interstate policy objectives within the confines of a dual state/federal regulatory framework."[210]

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[208] Id. at 964.

[209] Among them are the state commissions of California, Michigan, New York, Arkansas, Florida, Idaho, Indiana, Maine, Missouri, South Dakota, and the Public Service Commission of the District of Columbia.

[210] Preliminary Statement of the Opening Brief of the New York State Department of Public Service in the Computer III Appeal, dated January 14, 1988.

4.3 THE FCC's RESPONSE

In its preemption order, the FCC justified its preemption of state regulatory authority with the following statement:

> In originally imposing structural separation requirements, we acted pursuant to our authority under section 2 (a) of the Communications Act. We replace the structural separation requirements with nonstructural safeguards under the same authority, for our broad discretion in choosing the means by which we regulate is well established. The regulations we impose in place of structural separation are based on our perception of how to best regulate the changing enhanced services marketplace.... The safeguards that we adopt establish a comprehensive regulatory regime that addresses our goal to promote innovation and wide availability of efficient enhanced services.[211] [Emphasis added]

In defending its actions before the Court in the Computer III appeal, the FCC attempted to downplay and distinguish the express and clear language of the Louisiana decision and its affect on the actions taken by the FCC in Computer III by advancing arguments that rely on a very narrow and literal reading of sections 152 (a) and 152 (b).

The FCC relied on its assertion that "[i]f Congress had intended the jurisdictional limitation in Section 2 (b) (1) to apply to non-common carrier communication services, such as enhanced services, it could have readily used the phrase 'any person' rather than 'any carrier' in that Section."[212] The FCC pointed out that section 152 (a) uses the term *persons* and provides the Commission with jurisdiction over all of these persons engaged in interstate communication, contrasted with the term *carrier* used in section 152 (b), which the FCC characterized as "more restrictive."[213] Based on this assertion, the FCC concluded that

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[211] Report and Order, 104 FCC 2d, at 1124-1125.

[212] FCC Brief, supra note 141, at footnote 39, page 34.

[213] Id. at 34.

enhanced services are not among those activities exempted from FCC jurisdiction by section 152 (b).[214]

4.4 APPLICATION OF LOUISIANA TO THE COMPUTER III APPEAL AND PREDICTIONS ON THE OUTCOME

If the four-part preemption analysis suggested by the D.C. Circuit's interpretation of Louisiana is applied to the Computer III Appeal, the Ninth Circuit should uphold FCC preemption if it determines that the FCC has convincingly explained the necessity of its preemption action and that a narrower action was not feasible.

The FCC preemptive action will most likely pass the first, second, and third parts of the analysis. Although the analysis rejects preemption justified only on the grounds that a service is not subject to Title II regulation and is therefore not separable, the FCC in Computer III (as in CCIA) appears to have set forth clearly its rationale for preemption.[215] The Ninth Circuit will have to decide if the explanation is adequate and whether the objective was legitimate.

As to the fourth part of the analysis – whether the preemptive action could have been narrowed and still have achieved the FCC's objectives – the FCC Computer III orders, while exceptionally lengthy and complicated, do not describe whether the FCC objectives could have been met through narrower preemptive actions. If the Court finds this to be the case, it should remand the case and direct the FCC to make findings

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[214] In CCIA v. FCC, the D.C. Circuit Court of Appeals, at least implicitly, upheld the FCC's regulatory scheme regarding enhanced services (see CCIA v. FCC, 693 F. 2d 198 at 203). However, later (after Louisiana) the Court held that merely removing a service from Title II regulation, by itself, does not justify preemption. The FCC must show that "state regulation negates a valid federal policy" (see NARUC, 880 F. 2d 422 at 431, where the D.C. Circuit distinguished its NARUC findings from those in CCIA). The Court found that the FCC in CCIA had met the additional burden of explaining why the preemption was necessary to further a legitimate federal objective.

[215] See Phase I, Order on Reconsideration, 2 FCC Rcd 3035, para. 157 et seq.

on "whether the FCC's order, based on the [Computer III] record could have been narrowed and yet still achieve the asserted federal policy [objective of Computer III] ... without encroaching on [the state's regulatory authority]."[216]

[216] Paraphrasing the Court's findings in ARCO, 886 F. 2d 1325 at 1333.

CHAPTER FIVE

CONCLUDING REMARKS

Louisiana was not a simple decision that can stand only for the proposition that the FCC is prohibited from preempting state regulation of intrastate telephone industry depreciation practices. It was a complex decision that sought to examine and interpret the congressional intent of a regulatory act written over fifty years ago, apply it to an industry which has since undergone a technological revolution, and establish the jurisdictional boundaries of the often conflicting authorities which regulate the industry.

The Court's conclusion in Louisiana was that the FCC had exerted authority it did not have. Haring and Levitz, in their article Law and Economics of Federalism in Telecommunications,[217] suggested that Louisiana was either an "isolated deviation from the trend toward nullification of state regulatory authority in matters of concern to both state and federal regulators, or it signalled a restoration of state regulatory powers."[218] Louisiana signalled the latter by readjusting the balance of power between federal and state authorities that had been tipped in favor of the FCC.

Louisiana reminded the FCC that as a federal administrative agency, it could not confer power on itself. The Court's broad, but express, reading of section 152 (b) appears to be warning to the FCC to refrain

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[217] Supra note 163.

[218] Haring and Levitz, supra note at 314. The authors mentioned these characterizations of Louisiana in the context of speculating that the outcomes of the ARCO and Computer III appeal cases would be best indicators of the courts' perception of Louisiana. The authors also suggested, however, that under a literal reading of the case, "Louisiana restruck the balance of power between state and federal regulators of telecommunications by restoring state commissions' authority to regulate service which is 'local in nature' even if the policies they adopt might substantially and adversely affect the development or conduct of interstate communications." (Id. at 312)

from asserting preemptive powers it does not have under the Act.[219] The conclusions in Louisiana are a caution to the FCC to approach preemption carefully and narrowly so as to minimize disruption of state regulatory objectives.

Under this interpretation, Louisiana may be used to support the proposition that the FCC may preempt state regulation of telecommunica-ions only where the FCC can overcome the limitations on its power imposed on it by section 152 (b) of the Act and then only to the extent necessary to achieve a legitimate federal policy objective.

[219] The Court showed some sympathy for the FCC, however. The Court wrote that "while we do not deprecate [the respondents' concerns], section 152 (b) precludes both the FCC and this Court from providing the relief sought. As we so often admonish, only Congress can rewrite this statute." (Louisiana, 476 U. S. at 376)

Postscript

On June 6, 1990, the U.S. Court of Appeals, Ninth Circuit, issued its decision in the Computer III Appeal case (see People of State of Calif. v. F.C.C., 905 F. 2d 1217, Ninth Circuit 1990). On the issue of the FCC's preemption of state regulation, the Court rejected the FCC's position, vacated the Computer III orders, and remanded the matter to the FCC for further proceedings consistent with the Court's opinion. The Court's reasoning and analysis followed, in part, the holdings of the Louisiana decision discussed in this paper. As of August 17, 1990, the FCC was still considering whether to appeal the decision to the U.S. Supreme Court.