"NOTWITHSTANDING SECTION 2(B) . . .": RECENT LEGISLATIVE INITIATIVES AFFECTING THE FEDERAL–STATE BALANCE IN TELECOMMUNICATIONS REGULATION

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As discussed by Noam and Geller in the preceding chapters, the present-day telecommunications marketplace is one singularly ill-suited for a federal–state regulatory dichotomy predicated on geographical boundaries, and one for which greater-than-normal constraints on federal preemptive authority appear especially unwarranted. Yet this is precisely the situation that prevails, with limited exceptions, by virtue of the affirmative reservation of state authority over intrastate services that is codified in Section 2(b) of the Communications Act of 1934, 47 U.S.C. §2(b), as authoritatively construed by the United States Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). Section 2(b), the product of a confluence of political circumstances extant in the early decades of this century, is something of an anomaly in the current regulatory landscape. It frequently shackles the FCC from asserting authority to strike down state laws that have the potential to frustrate federal telecommunications policy, although the agency clearly would be entitled to so preempt the conflicting state provisions under well-established Supremacy Clause jurisprudence in the absence of Section 2(b).

In several recent legislative initiatives, however, both Congress and the Executive Branch have signaled a recognition that continued application of Section 2(b) as the governing framework for dividing the spheres of federal and state regulatory authority over new and existing telecommunications technologies may, at least in some instances, disserve the public interest. One major telecommunications law enacted in 1993, and several bills of far-reaching significance introduced and still pending before Congress (with a high probability of passage) as

of this writing have explicitly withdrawn areas of telecommunications regulation from the ambit of Section 2(b), often prefacing the sections pertaining to preemption with the phrase "Notwithstanding Section 2(b) . . .", or some variant. These provisions, although perhaps not sounding a death knell for Section 2(b), certainly herald a growing Congressional interest in expanding the FCC's preemptive jurisdiction, taking away from the state public service commissions some of what, in the aftermath of *Louisiana PSC*, they could have reasonably believed to be rightfully theirs.

The first major blow to state regulatory prerogatives regarding telecommunications appears in the Omnibus Budget Reconciliation Act of 1993,[1] which was signed into law on August 10, 1993. Among several sections dealing with telecommunications, the Budget Act amended Section 332 of the Communications Act, 47 U.S.C. §332, to mandate regulatory parity for all commercial mobile radio services and to foreclose state regulation of those services in certain areas. A brief synopsis of the key features of Section 332, as amended, is in order here to provide a context for the discussion of Section 332's provisions on preemption that follows.

Commercial mobile radio services (CMRS) are defined in the statute as all mobile radio services that are "provided for profit and make interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the [Federal Communications] Commission." The term *interconnected service* refers to service that connects the user to the public switched telephone network.

In passing this amendment to Section 332, Congress was concerned that providers of a number of services theretofore classified as private land mobile radio services, most notably wide-area Specialized Mobile Radio (SMR) service and private carrier paging service, had become viable competitors to cellular radio, common carrier paging and other common carrier radio services, but operated under a much more liberalized regulatory scheme. The private land mobile radio service had been created initially to serve the internal communications needs of public safety entities and large businesses, but evolved over the years to include some "private carrier" services that private land mobile licensees were permitted to offer to third parties on a for-profit basis. Especially in the last few years, limitations on end-user eligibility for these private carrier services have been greatly relaxed, further encouraging direct competition with common carrier services. It remained, however, that mobile radio services classified as common carriage were subject to a host of requirements contained in Title II of the Communications Act. Their rates and practices were carefully scrutinized to ensure that they were reasonable and devoid of unjustifiable discrimination, whereas the competing private carriers were free of these Title II requirements. Compounding this disparity in the regulatory treatment of the two types of services was the circumstance that the former version

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[1]P.L. No. 103-66, §6002, 107 Stat 312, 392.

of Section 332 precluded the states from regulating the rates of private carriers or restricting marketplace entry of private carriers, but did not similarly restrict state regulation of mobile common carrier services.

Radio common carriers attacked the dual regulatory scheme as arbitrary and unfair, claiming that compliance with the Title II requirements and the implementing FCC rules hamstrung them in their efforts to compete vigorously against private carriers. The need to address this issue received added stimulus from the FCC's 1992 proposal to license personal communications services (PCS), a new generation of mobile services that could conceivably be regulated as radio common carriage, private radio, or both, but that, in any event, could provide a highly attractive alternative to many existing mobile service offerings.

Congress' response was to group traditional radio common carriers and competitive private carriers into the new regulatory classification—CMRS—and limit private land mobile regulation to public safety services and other services that are not designed to meet the telecommunications needs of the general public. Under the new Section 332, all CMRS providers are to be regulated as common carriers, but the FCC has been accorded discretion to "forbear" from enforcing certain Title II requirements against CMRS providers if it is satisfied that imposition of those requirements is not necessary. (The agency has in fact exercised this flexibility, holding that a number of Title II provisions will not be applied to CMRS.[2])

Section 332(c)(3) of the Communications Act, as amended by the 1993 Budget Act, specifies that "[n]otwithstanding Section[] 2(b) . . . , no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." (As earlier noted, the ban on state rate or entry regulation of *private* land mobile services antedated passage of the Budget Act.) Congress thus removed from state purview all rate or entry regulation of the fastest growing segment of the telecommunications industry, invalidating, for example, laws governing intrastate cellular rates that several states had enacted, and ensuring federal primacy in PCS policy making. It did so in the belief that the traditional jurisdictional demarcation mandated by Section 2(b) would prove unworkable for mobile services which, in the words of the House Report on the legislation, "by their nature, operate without regard to state lines."[3]

It bears noting that Section 332 does not compel a complete withdrawal of all state regulation of mobile services. First, Section 332 expressly recognizes the right of state authorities to impose nondiscriminatory requirements on CMRS to ensure universal service at affordable rates "where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State." Second, any state may petition the FCC for authority to regulate

[2]*Implementation of Sections 3(n) and 332 of the Communications Act*, 74 RR 2d 835 (1994).

[3]H.R. 103-11, at 259-260 (1993). The Conference Report is H.R. 103-213.

CMRS rates upon a showing that market conditions in the state will not suffice to ensure that subscribers are protected from unjust and unreasonable rates or unreasonably discriminatory practices. If a state that was already regulating mobile service rates files a petition to continue such regulation, the existing regulatory scheme is permitted to remain in effect until the FCC rules on the petition. But the burden of proof ultimately lies with the state to demonstrate that state rate regulation is necessary. The FCC, in implementing this provision, has held that states will have to "clear substantial hurdles if they seek to continue or initiate rate regulation of CMRS providers."[4] Moreover, any state rate regulation that is authorized on this basis may be ordered discontinued after the passage of a "reasonable period of time" if "any interested party" subsequently files a petition demonstrating that changed circumstances have obviated the need for such regulation. Third, and perhaps most significantly, Section 332 acts as a bar only to rate and entry regulation; by its express terms, it does not preclude state regulation of "other terms and conditions of commercial mobile services." The legislative history[5] indicates that Congress viewed the following as examples of the "terms and conditions" that may still be the subject of state or local regulation: customer billing practices, billing disputes and other consumer protection matters, facilities zoning issues, transfers of control, bundling of service and equipment, and requirements that carriers make capacity available on a wholesale basis for resale. But even with regard to these "terms and conditions" for the offering of commercial mobile services, the states are not guaranteed regulatory primacy; the FCC may still seek to preempt state regulation in any or all of these areas, but it will only be allowed to do so if it can meet the *Louisiana PSC* test for federal preemption under Section 2(b).

In sum, then, the telecommunications preemption provisions of the 1993 Budget Act leave the states with only a modest role in the regulation of mobile services, tilting the balance of federal and state regulation decidedly in favor of the FCC. The balance struck is far different from what would have been the case had Congress simply decided to allow Section 2(b) to supply the governing principles for dividing regulatory authority in this area. Developments occurring in the first session of the 103d Congress suggest that a similar expansion of federal preemptive jurisdiction will occur in the context of the Clinton administration's National Information Infrastructure (NII) initiative and related legislation.

OTHER RECENT CONGRESSIONAL ACTIONS

One of the key telecommunications-related bills to emerge in the 103d Congress is H.R. 3636, the National Communications Competition and Information Infrastructure Act of 1993. Approved by the House Commerce Committee on March 16, 1994, H.R. 3636, if enacted, would overturn the existing cable/telephone

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[4] *Implementation of Sections 3(n) and 332 of the Communications Act*, 74 RR 2d 835, 843 para. 23 (1994).

[5] H.R. 103-11, at 261 (1993).

company cross-ownership rule that bars LECs from offering video programming directly to subscribers within their service areas. It is also designed to open the "local loop" to competition from cable companies and other entities, imposing new duties on LECs to interconnect with and provide "equal access" to potential competitors.

As initially introduced by Representative Markey, H.R. 3636 has a number of provisions addressing the scope of federal and state regulation. Most significantly, it contained the following:

> STATE PREEMPTION.—Notwithstanding section 2(b), no State or local government may, after one year after the date of enactment of this subsection (A) effectively prohibit any provider of any telecommunication services from providing that or any other such service, or impose any restrictions on entry into the business of providing any such service that is inconsistent with this subsection or any provision of this Act, or any regulation thereunder; (B) prohibit any carrier or other person providing telecommunications services from exercising the access and interconnection rights provided under this subsection; or (C) impose any limitation on the exercise of such rights that is inconsistent with this subsection or the regulation prescribed under this subsection.

This provision would foreclose state regulators from restricting or conditioning new entry into a wide range of wireline telecommunications services, even those for which there may arguably be a segregable intrastate component. In the sweep of its language one can discern an unequivocal rejection of the jurisdictional compromise embodied in Section 2(b). H.R. 3636 has as its vision a new era of largely unfettered competition in the provision of telecommunications services historically provided by de jure or de facto monopolists; in this brave new world, H.R. 3636 seems to say care must be taken to ensure that the federal ambition is not thwarted by state regulators seeking to further narrow interests. The essential prophylactic measure for this purpose is to take Section 2(b) out of play.

H.R. 3636 does acknowledge state concerns. It calls for the establishment of Federal–State joint boards to develop recommendations on a variety of issues, including the preservation of universal service and the jurisdictional cost separations process; provides that nothing in the bill is intended to limit state authority to regulate the allocation of costs for intrastate rate-making purposes; and enjoins the FCC to "coordinate and consult with" state regulatory bodies, among others, in developing network reliability and service quality performance measures that are required by the bill. But these provisions did little to ease state regulators' concerns about the scope of the federal preemption contemplated by the legislation. State officials voiced these concerns at February 1994 hearings on H.R. 3636,[6] and the final version of the bill that passed the Commerce Committee did contain some concessions to the states, principally in the form of specific language

[6]*Communications Daily*, February 10, 1994, p. 1.

to clarify state authority to regulate the terms and conditions of the provision of telecommunications and information services.[7] However, the core preemption provisions on entry regulation remained.

Another major telecommunications bill introduced in the 103d Congress is H.R. 3626, the Antitrust Reform Act of 1993, which is designed to phase out the line-of-business restrictions placed on the BOCs by the Modification of Final Judgment. Section 107(c)(2) of the bill, as it was introduced on November 22, 1993, addresses the issue of federal preemption, stating simply, "This Act shall supersede State and local law to the extent that such law would impair or prevent the operation of this Act." This provision appears to be designed to provide a less rigorous test for the assertion of federal preemption than that supplied by Section 2(b). There is, after all, no mention of state prerogatives with regard to intrastate services, and one can assume that the drafters of the legislation would have felt no need to include this language had they intended that preemption of state laws inconsistent with H.R. 3626 simply be in accord with Section 2(b).

It would thus appear from a reading of the provision in isolation that whatever other laws might eventually be superseded under Section 107(c)(2), the one statutory provision that is clearly superseded is Section 2(b). Unfortunately, the matter is confused by the immediately preceding Section 107(c)(1), which asserts cryptically that "[e]xcept as provided in [Section 107(c)(2)], this Act shall not be construed to modify, impair, or supersede *Federal*, State, or local law unless expressly so provided in this Act" (italics added). The upshot is that H.R. 3626's treatment of the preemption issue remains somewhat uncertain, hopefully to be clarified later in the legislative process through redrafting or authoritative statements in the legislative history. But the desire to include in the bill a section specifically dealing with the question of conflicting state regulation does suggest, once again, a dissatisfaction with permitting Section 2(b) to stand as the controlling rule of law. In any event, the H.R. 3626 that is voted on by the full House may be significantly different from the bill originally introduced; in March 1994, separate versions of the bill were voted out by the House Commerce and Judiciary Committees.

CLINTON'S NII AND THE STATES

The Clinton administration has prepared its own legislative package for creation of the National Information Infrastructure. It endorses and builds upon much of what is in H.R. 3636 and H.R. 3626, as well as the counterpart Senate bills. But the administration's proposals in some ways go even further in limiting state regulatory power over telecommunications.

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[7] *Id.*, March 1, 1994, p. 3.

In its NII White Paper, the administration offered its general view on federal–state relations. It begins cautiously enough:

> Because of the crucial role of the states in protecting ratepayers and addressing economic and technical infrastructure issues in their areas, substantial state jurisdiction over telecommunications must be preserved. However, when national interests are at stake in realizing the benefits of an advanced, interconnected NII, particularly through local competition, national policies, with limited preemptive effect in a few key areas, are necessary.

In elaborating on its proposals, however, the administration indicates that it views clear-cut federal preemption as "necessary" in a number of areas in which the pending House bills have been silent on the question. Thus, for example, the administration embraces H.R. 3636's preemption of state entry regulation of telecommunications and information services providers, but seeks to have added to the bill a provision that would also preempt state and local regulation of "the rates for any service charged by a telecommunications carrier that the FCC finds, or has found, after notice and comment, to lack market power." (The administration would permit states to petition the FCC to retain or regain rate regulation authority under certain circumstances, just as is allowed under Section 332 of the Communications Act.)

Of even greater concern to state regulators is the administration's proposal to add a new Title VII to the Communications Act. Title VII, in essence, would establish a new, streamlined regulatory framework for eligible providers of two-way, broadband digital transmission services—the services viewed as the linchpin of the NII. Although the FCC would be delegated authority to define more precisely which broadband services qualify for streamlined regulatory treatment, the agency would be required to apply its implementing rules without regard to whether the provider of the broadband services is a common carrier or a cable television operator. But to take advantage of this streamlined regulatory treatment, the broadband services provider would have to agree to assume specified obligations pertaining to open access, universal service, and interconnection and interoperability with other service providers.

The administration proposes to preempt state and local regulation of the rates of those Title VII service providers that are determined by the FCC to lack market power, that is, to be subject to competitive pricing constraints. States would still be permitted to regulate the intrastate rates of Title VII service providers that are found to have market power. In addition, according to the NII White Paper, states would be empowered to regulate rates for "other services delivered over the facilities used to furnish Title VII broadband services, in the discretion of the states, subject only to a reserved right of Federal preemption that could be exercised to the extent necessary to avoid conflicts between state regulatory actions and the policies of Title VII."

State regulators are unhappy with Title VII. Citing ambiguities regarding the extent to which Title VII would permit federal preemption of intrastate rate regulation, the Executive Committee of NARUC voted to oppose the initiative on March 3, 1994. Further, although none of the pending telecommunications bills have incorporated the Title VII proposal despite administration lobbying, NARUC's Executive Committee also issued a resolution expressing that body's concern that the pending bills "contain provisions that would alter the jurisdictional authority of [the FCC] and state public utility commissions in regulating interstate and intrastate communications, with some aspects of state regulation preempted and primary responsibility for other activities transferred to the FCC."[8]

Regardless of the ultimate fate of Title VII, it and the other legislative proposals discussed here appear to reflect a growing consensus at the federal level that it is counterproductive to apportion federal and state regulatory authority over telecommunications on the basis of the Section 2(b) interstate/intrastate distinction. Even if Section 2(b) is not repealed and replaced any time soon—and any assessment of the prospects for near-term repeal must take account of the formidable political forces that will be aligned against such action—it seems likely that Section 2(b) will be slowly eviscerated by the continued inclusion in new telecommunications bills of superseding preemption provisions specific to the subject of the legislation. As each new piece of telecommunications legislation with its very own preemption section becomes law, Section 2(b) will continue a downward spiral into irrelevance.

If decisions about the appropriate relationship between federal and state authorities in regulating telecommunications continue to be made by Congress on a case-by-case basis, the expansion of federal preemptive authority will also continue. This may occur in any event, and may very well be in the best interest of the nation, but ad hoc decision making on telecommunications preemption issues will likely lead to considerations of federalism being overwhelmed by the more immediate policy and political imperatives giving birth to the legislation. If the matter at hand is important enough to merit a carefully thought-out Congressional response, federal proponents of the legislation are likely to believe it is also important enough to warrant removing 50 potential obstacles to achievement of the federal goal. Given this circumstance, it may be in the interest of state regulators to now seek from Congress a new statutory provision on the division of federal and state regulatory authority over telecommunications to replace Section 2(b), one that will be sufficiently palatable to federal lawmakers such that its application to new technologies that are the subject of future legislation will be the norm rather than the exception. Any "new" Section 2(b) must define the respective regulatory spheres of the federal government and the states on a more sensible basis than the current, anachronistic interstate/intrastate distinction, but it need not, and should not, be formulated in derogation of legitimate state regulatory interests.

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[8]As reported in *Communications Daily*, March 4, 1994, p. 2.