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ARTICLES

FCC Preemption After *Louisiana PSC*

Michael J. Zpevak*

I. INTRODUCTION

Richard McKenna first predicted it in 1985, it commenced in 1986, and it culminated in 1990. But now that the Federal Communications Commission's (FCC) pre-*Louisiana PSC*[1] pre-

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1. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) [hereinafter *Louisiana PSC*].

emptive powers have been whittled down to their statutory base by the judiciary, how will the FCC, a nationally important agency, fulfill its critical congressional mandate? The precise extent to which previous FCC preemptive authority has been emasculated by recent appellate decisions may be subject to fair debate. However, few would contend that the FCC faces a low hurdle in continuing to implement national telecommunications policies in light of the contemporary preemption-limiting legal trend.

The referenced appellate decisions are grounded in legislative intent. These decisions do no more than interpret reasonably what many would contend were the original intentions of Congress in enacting the pertinent portions of the Communications Act of 1934, as amended.[2] What has transpired, therefore, is not a judicial assassination plot against FCC preemption authority. Rather, what has happened is a justifiable realization on the part of the courts that the legal theories supporting FCC preemption had perhaps strayed somewhat over the years, and needed to be realigned more closely with Congress' original desires.

Thus, rough boundaries of legally acceptable FCC preemption have now been drawn. What remains unclear is how the FCC will continue to set *national* policy as required of it by section 1 of the Act,[3] while not intruding upon *state* territory forbidden to it by section 2(b) of the Act.[4] This Article examines the history leading up to the current state of the law governing FCC preemptive powers, analyzes various ways in which the FCC might operate effectively within the range of those restricted powers, and offers some thoughts about where the current road may lead us if the Commission is unable to fulfill its section 1 obligations under current legal interpretations of its preemption authority.

II. PRE-*LOUISIANA PSC* PREEMPTION

In his widely respected, scholarly 1985 article on FCC preemption, Richard McKenna set forth a very thorough and en-

2. 47 U.S.C. §§ 151-613 (1988).
3. 47 U.S.C. § 151 (1988).
4. 47 U.S.C. § 152(b) (1988).

lightening overview of the history and then-existing status of the law governing preemption under the Communications Act.[5] But he also did much more than that—he gave all the clues one should have needed to foresee the landmark *Louisiana PSC* case that would come down from the Supreme Court the following year, effectively reversing a long line of cases by overturning FCC preemption in the telecommunications equipment depreciation area. Yet, probably many industry observers, whether or not they exhibited it publicly, were taken aback by the result of that case.

Section 1 of the Communications Act (the Act) grants the FCC expansive powers over the telecommunications arena, "[f]or 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 the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service. . . ."[6] Section 2(b) provides, in pertinent part, "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . . ."[7] These parts of the Communications Act have remained virtually unchanged since their adoption in 1934, however there has been a definite evolution in terms of the judicial translation of these sections over the years.

Despite the FCC's 1968 *Carterphone* decision allowing the connection of non-telephone company provided customer premises equipment (CPE) to the public switched network,[8] it became clear to the FCC in the early 1970's that some state commissions were intending to prevent such interconnection within their jurisdictions. The FCC issued a declaratory ruling asserting preemption over this area, and on appeal the Fourth Circuit affirmed.[9] The court held that the section 2(b) censure on federal authority was limited to local matters "that in their nature

5. Richard R. McKenna, *Preemption Under the Communications Act*, 37 FED. COMM. L.J. 1 (1985).

6. 47 U.S.C. § 151 (1988).

7. 47 U.S.C. § 152(b)(1) (1988).

8. Use of the Carterfone Device in Message Toll Tel. Serv., Decision, 13 F.C.C.2d 420 (1968).

9. Telerent Leasing Corp., Memorandum Opinion and Order, 45 F.C.C.2d 204

and effect are separable from *and* do not substantially affect the conduct or development of interstate communications."[10] Further, based upon its interpretation of the legislative history, the court held that the mirror-image language of section 221(b) in Title II of the Act governing common carriers applied only in situations where a service area straddled a state borderline.[11] *North Carolina Utilities Comm'n II v. FCC* (*NCUC II*),[12] decided one year later, followed all the main holdings of *NCUC I*.

Also in 1977, in *California v. FCC*,[13] the D.C. Circuit ruled that the FCC could regulate interstate services offered by other common carriers (OCCs) even where the OCCs' facilities were situated entirely within the boundaries of a single state. The Court held that the FCC could regulate facilities used for both interstate and intrastate purposes wherever it was " 'technically and practically *difficult* to separate the two types of communications.' "[14]

In the 1982 *Computer and Communications Indus. Ass'n v. FCC* decision,[15] which affirmed the FCC's preemption of state CPE and enhanced services regulation in *Computer II*,[16] the D.C. Circuit adopted the Fourth Circuit's highly limited interpretation in *NCUC I* and *NCUC II* of the applicability of sections 2(b) and 221(b). Thus, in his 1985 article Richard McKenna rightly concluded that, under the law at that point, "[e]ven if there is separability in the first instance between interstate and intrastate elements, the second part of the test applied in the *North Carolina* cases and *CCIA v. FCC* may justify FCC preemption—where the local services or facilities 'substantially affect[ing] the conduct or development of interstate

(1974), *aff'd sub nom.*, North Carolina Util. Comm'n v. FCC, 537 F.2d 787 (4th Cir.) [hereinafter *NCUC I*], *cert. denied*, 429 U.S. 1027 (1976).

10. *NCUC I*, 537 F.2d at 792 (emphasis added).

11. *Id.* at 795 n.11.

12. 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

13. 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

14. *Id.* (quoting AT&T and Associated Bell Syst. Cos. Interconnection with Specialized Carriers, Memorandum Opinion and Order, 56 F.C.C.2d 14, 19 (1975))(emphasis added).

15. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) [hereinafter *CCIA v. FCC*], *cert. denied*, 461 U.S. 938 (1983).

16. Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 F.C.C.2d 384 (1980) [hereinafter *Computer II*], *aff'd sub nom.*, Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

communications.' "[17]

Two years later, the Fourth Circuit affirmed the FCC's *Depreciation Preemption Order*,[18] which had asserted federal primacy over certain telecommunications depreciation areas, with the court following the same jurisdictional rationale as the *North Carolina* line of cases. The court based its holding upon the conclusion that "the conduct and development of interstate communications would undoubtedly *be affected* by the states' imposition of depreciation policies that slowed capital recovery and innovation,"[19] and went on to observe that "physical impossibility is but one ground for preemption; *frustration* of federal objectives provides a rationale *at least equally valid*."[20]

One month prior to release of the *Louisiana PSC* decision by the Supreme Court, federal appellate courts were still faithfully following *CCIA v. FCC* and the *North Carolina* line of preemption cases. In *State Corp. Comm'n v. FCC*,[21] the Tenth Circuit considered an appeal of an FCC order preempting states from altering the sampling periods employed by local exchange carriers ("LECs") to separate the costs of equipment used in both interstate and intrastate telecommunications services. The court noted that the FCC could preempt "when the enforcement of state law would conflict with federal law or otherwise frustrate achievement of Congressional objectives."[22] The court relied heavily upon section 221(c) as empowering the FCC to " 'classify the property' of 'carriers engaged in wire telephone communication' and 'determine what property of said carrier[s] shall be considered as used in interstate or foreign telephone toll service.' "[23] The Court reasoned away both the section 152(b) and 221(b) exemptions for state authority, on the same bases utilized by the long line of cases before it,[24] and proclaimed that "[even] [s]tate regulation which formally restricts *only intrastate*

17. McKenna, *supra* note 5, at 203 (quoting *CCIA v. FCC*, 693 F.2d at 215).

18. Amendment of Part 31, Uniform Sys. of Accounts for Class A and Class B Tel. Cos., Memorandum Opinion and Order, 92 F.C.C.2d 864 (1983), *aff'd sub nom.*, Virginia State Corp. Comm'n v. FCC, 737 F.2d 388 (4th Cir. 1984), *rev'd sub nom.*, Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

19. *Virginia State Corp. Comm'n*, 737 F.2d at 395 (emphasis added).

20. *Id.* at 396 (emphasis added).

21. 787 F.2d 1421 (10th Cir. 1986).

22. *Id.* at 1425.

23. *Id.* (quoting 47 U.S.C. § 221(c) (1988)).

24. *Id.* at 1427-28.

communications may not stand when it encroaches substantially upon federal authority over interstate matters."[25]

Thus, just prior to *Louisiana PSC*, the law of preemption could be summarized as follows: the FCC could preempt multijurisdictional use of facilities if it was simply "difficult" to separate the inter-and intrastate communications flowing over them, and mere "frustration" of federal objectives could constitute a "substantial effect" upon federal jurisdiction supporting preemption of intrastate communications as an *independent* ground (irrespective of whether inter- and intrastate communications could be separated in some way). Taking due note of the relative ease with which the FCC at that point was able to justify preemption, McKenna concluded:

> We are left with this situation: The courts have adopted a definition of intrastate that, as a practical matter, extends *potential* FCC jurisdiction . . . over all common carrier communications facilities. Even where separability of the interstate and the intrastate can be demonstrated, the "substantially affect" test may bring a matter within the FCC's preemptive power.[26]

The following year, the Supreme Court granted certiorari to review the Fourth Circuit's affirmance of the FCC's *Depreciation Preemption Order.*

III. *Louisiana PSC* and its Progeny

There were numerous signs that the Supreme Court in *Louisiana PSC* would reverse the Fourth Circuit's affirmance of the FCC's *Depreciation Preemption Order*. No less than twenty-three different states, and thirty *amici curiae*, argued for reversal, indicating a substantial show of force in alliance against what many apparently saw as the continuation of unchecked FCC preemption. Further, the FCC itself had originally ruled that it had not intended for its Order to "have any preemptive effect that does not arise by operation of law," adding that "[n]o policy of this Commission would be furthered by requiring state commissions to adhere to the rules we have adopted for the purposes of computing the interstate revenue requirement."[27] It

25. *Id.* at 1427 (emphasis added).

26. McKenna, *supra* note 5, at 59.

27. Amendment of Part 31, Uniform System of Accounts for Class A and Class B Tel. Cos., Memorandum Opinion and Order, 89 F.C.C.2d 1094, 1097 (1981).

was only upon reconsideration that the FCC decided to preempt.[28]

Several aspects of *Louisiana PSC* are noteworthy. First, the FCC clearly had much legal support for its position. In addition to its broad-sweeping section 151 powers and the long line of cases supporting federal preemption thereunder, the FCC also found support in the applicability of section 220 of the Act. This section provides that "[t]he Commission *shall* . . . prescribe for . . . carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which *shall* be charged with respect to each of such classes of property," and that "carriers *shall not*, after the Commission has prescribed the [classes] of property for which depreciation charges may be included . . . charge with respect to any class of property a percentage of depreciation other than that prescribed therefor by the Commission."[29] Moreover, section 220(h) grants the FCC discretion to "except the carriers of any particular class or classes in any *State* from any of the requirements" under the section "in cases where such carriers are subject to State commission regulation with respect to matters to which this section relates."[30] A significant number of industry observers probably thought (with justification) that these specific statutory provisions, in addition to the precedential momentum that FCC preemption was riding at the time, ensured Supreme Court affirmance.

However, the Supreme Court felt strongly that the preemption trend needed to be retracked, and thus found ways to justify rebutting every argument raised by the FCC. It stated that neither the broad general FCC powers under section 151 nor the specific powers under section 220 overrode the language of section 152(b) that "*nothing* in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for *or in connection with* intrastate communication ser-

28. Amendment of Part 31, Uniform System of Accounts for Class A and Class B Tel. Cos., Memorandum Opinion and Order, 92 F.C.C.2d 864 (1983), *aff'd sub nom*, Virginia State Corp. Comm'n v. FCC, 737 F.2d 388 (4th Cir. 1984), *rev'd sub nom*, Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986).

29. 47 U.S.C. § 220(b) (1988) (emphasis added).

30. 47 U.S.C. § 220(h) (1988) (emphasis added).

vice."[31] Thus, the Court held that section 152(b) expressly "denies the FCC the power to pre-empt state regulation of depreciation for intrastate ratemaking purposes."[32]

The Supreme Court seemingly swept aside the long line of appellate cases upholding preemption in a single stroke:

> While it is certainly true . . . that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress, 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. . . . Section 152(b) constitutes . . . a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes.[33]

Finally, the Court distinguished its decision from many of the preceding cases upholding FCC preemption by pointing out that the Act's separations provisions[34] furnished a perfect vehicle for separating the interstate and intrastate components of the asserted jurisdiction in the case.[35]

A. *"Treatment Severability"*

In summary then, the legal test before *Louisiana PSC* was that section 152(b) barred FCC preemption *only* when (1) the matter to be regulated was purely intrastate in nature, *and* (2) federal objectives were not affected adversely by the state regulation in question. In contrast, the test adopted by *Louisiana PSC* is that section 152(b) bars FCC preemption even in the case of a jurisdictionally mixed subject matter, whenever it is possible somehow to effect separate, simultaneous federal and state regulation over that singular subject matter. For purposes of this article, this basis of severability will be referred to as "treatment

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31. 47 U.S.C. § 152(b) (1988) (emphasis added).

32. *Louisiana PSC*, 476 U.S. at 373. Some might contend that the Supreme Court must have construed the section 152(b) "in connection with" language very broadly to support its conclusion that the statute amounts to a "denial" of FCC power. The problem with this interpretation of *Louisiana PSC* is, of course, that read too broadly, "in connection with intrastate communication service" could conceivably include nearly any aspect of communications. Such a result would make no sense within the overall context of the Act. Thus, there seems to be good reason for concluding that the Court did not intend to construe the section 152(b) "in connection with" language in an overly broad fashion.

33. *Id.* at 374 (first emphasis added) (citation omitted).

34. 47 U.S.C. § 410(c).

35. *Louisiana PSC*, 476 U.S. at 375.

severability," since separate federal and state *treatment* of the same, undivided subject matter was found to be practical, rather than actually severing different aspects of the subject matter.[36]

Despite the decisive language of *Louisiana PSC*, the opinion left more questions than answers.[37] Thus, the circuit courts that decided cases post-*Louisiana PSC* were called upon to render important interpretations of the new preemption test.

B. FM Subcarrier *("Subject Matter Severability")*

Less than three months after *Louisiana PSC* was handed down, an appellate court had the opportunity to interpret the decision in a different context—the FCC's expansive authority over radio matters under the Communications Act. In *FM Subcarrier*,[38] the FCC had preempted (prior to *Louisiana PSC*) state regulation that had the effect of prohibiting or impeding entry of radio common carrier services operating on FM subcarriers.[39] The FCC instituted this action in support of its general pro-competitive policies and based its preemption order upon its exclusive federal jurisdiction over radio matters under Title III of the Act.[40]

However, despite the fact that section 152(b) states expressly that it is subject to section 301, the D.C. Circuit, citing *Louisiana PSC*, ruled that "[t]he obvious intent of this scheme is to divide the jurisdiction over intrastate radio common carriage

36. Note that it is not possible to tell for certain from the language in the *Louisiana PSC* opinion whether the Supreme Court was ruling that the Section 152(b) denial of authority to the FCC over intrastate matters and the separability of treatment of the subject matter under Section 410(c) each stood as *independent* bases of reversal, or if it was only the existence of the combination of the two that warranted reversal. Thus, one cannot be certain from the opinion what the Supreme Court would do with the situation of a purely intrastate communications service, where state regulation of the service somehow indirectly impeded a valid federal goal, and where it was impossible to carve out any basis for co-existing federal and state jurisdiction. However, in the *CPE Sales Agency* decision discussed *infra*, Section III(D), at least one post-*Louisiana PSC* appellate court has hinted strongly that the FCC *could* preempt in such a situation.

37. *See* Richard R. McKenna, *Preemption Reversed: The Supreme Court's Decision in* Louisiana Public Service Commission v. FCC, 39 ADMIN. L. REV. 43 (1987).

38. California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986) [hereinafter *FM Subcarrier*].

39. Use of Subsidiary Communications Authorization, Final Rule, 49 Fed. Reg. 19,659 (1984).

40. *FM Subcarrier*, 798 F.2d at 1517 (citing 47 U.S.C. §§ 301-399 (1988)).

services between state and federal authorities. States retain authority over the *common carriage aspects* of such services, while the FCC is authorized to regulate the *radio transmission aspects*."[41] The court concluded that "whatever the extent of the Commission's Title III authority, it is limited to the *non*-common carrier aspects of intrastate radio communication . . . [S]ection 301 does not authorize the Commission to preempt state regulation of intrastate radio common carriage merely because these regulations may frustrate the entry of FCC licensees."[42] Thus, the court found a way under the Act, as interpreted in *Louisiana PSC*, to extend separate, non-conflicting areas of jurisdiction to the FCC and the states by identifying two distinct *aspects* of the subject matter at issue, one appropriately assigned to the federal jurisdiction and the other to the state jurisdiction. In this fashion, the court was able to foster the dual regulatory scheme intended by Congress while simultaneously limiting FCC preemptive powers, as required by *Louisiana PSC*. This is clearly a different type of severability than "treatment severability," because here the subject matter *itself* was divided into separately regulable aspects. For purposes of this Article, this second type of severability will be referred to as "subject matter severability."[43]

C. *NARUC III ("Regulation Severability")*

National Ass'n of Regulatory Util. Comm'rs v. FCC (*NARUC III*),[44] an important case in the law of preemption for several reasons, was next in the line of cases following *Louisiana PSC*. In *NARUC III*, the FCC, post-*Louisiana PSC* preempted all state regulation over the installation and maintenance of inside wiring used for both interstate and intrastate telephone

41. *FM Subcarrier*, 798 F.2d at 1519 (emphasis added).

42. *Id.* at 1520.

43. The case of Hawaiian Tel. Co. v. Public Util. Comm'n of Haw., 827 F.2d 1264 (9th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) was decided subsequent to the *FM Subcarrier* decision. Although an important case for several reasons not pertinent to this article, in terms of preemption law this case merely pointed out that, under *Louisiana PSC*, a state's independent depreciation rule is protected from federal preemption only *after* a uniform, FCC-derived separations formula has been applied. The case explains that establishment of such separations formulas is, in the first instance, subject to exclusive FCC jurisdiction under 47 U.S.C. § 410(c). *Id.* at 1276.

44. 880 F.2d 422 (D.C. Cir. 1989).

communication. The Commission advanced two distinct grounds to support its preemptive action: (1) that section 152(b) reserves jurisdiction to the states *only* over *common carrier* communication services (and the Commission had concluded in its proceeding below that provision of inside wiring was no longer a common carrier service); and (2) that even if section 152(b) were applicable, inside wiring was not severable into separate interstate and intrastate components so as to permit separate federal and state regulation over that subject matter. The D.C. Circuit rejected the first FCC argument, and furnished a significant interpretation of *Louisiana PSC* regarding the second argument.

As to the first FCC argument, the court pointed out that the reach of section 152(b) is not limited by its express terms to intrastate common carrier communication services. The court noted that even if section 152(b) could be so interpreted, "inside wiring would still fall within [that section] as a facility or service offered '*for or in connection with*' a common carrier communication service, namely, intrastate telephone service."[45]

With respect to the second FCC argument, the court rejected what it referred to as the "circularity" of the FCC's reasoning. The Commission had ruled that provision of inside wiring had to be preempted because it was no longer severable into separate state and interstate components, that it was no longer severable because it was no longer subject to the jurisdictional separations process of section 410(c), and that it was no longer subject to section 410(c) because the FCC had concluded that it was not a common carrier service and was preemptively deregulated. Had this reasoning prevailed, the FCC potentially could have asserted preemption as it did prior to the *Louisiana PSC* decision.[46]

The D.C. Circuit did acknowledge, however, that the FCC had legitimately established a valid federal policy goal of a freely competitive market for interstate inside wiring, and that there could be certain state regulations that would clearly impede that valid federal goal, thus justifying federal preemption. The court held only that the FCC's original preemption order was overbroad in purporting to preempt *all* possible state regulation in

45. *Id.* at 428 (emphasis added).
46. *Id.* at 429.

the area—even that which could not be said to impede any aspect of the FCC's federal goal. Therefore, the Court remanded to the FCC for further proceedings to identify the limited, specific areas of potential state regulation which could "thwart or impede" attainment of the federal goal of a competitive interstate inside wiring market.[47]

Thus, *NARUC III* set forth two important lessons stemming from *Louisiana PSC*. First, section 152(b) reserves to the states jurisdiction over not only common carrier intrastate services, but also over non-common carrier facilities or services offered for or in connection with an intrastate common carrier service. Second, in addition to finding ways to permit overlapping state and federal jurisdiction over precisely the same subject matter to co-exist (i.e., "treatment severability," such as under the section 410(c) separations process), and in addition to "subject matter severability" (as in *FM Subcarrier*), another acceptable way to devise severability under the dual regulatory scheme of the Communications Act is to permit separate, *non-conflicting* state and federal regulations over the same, undivided subject matter. For purposes of this article, this third form of legally acceptable severability will be called "regulation severability." Significantly, the court noted with respect to this second point that when the FCC preempts certain state regulations over a given subject matter, it "has the burden . . . of showing with some specificity that [if not preempted, the particular state regulations being preempted] would negate the federal policy" in question.[48]

D. CPE Sales Agency

One month after *NARUC III*, the D.C. Circuit issued its decision in the *CPE Sales Agency* case,[49] which also involved an FCC preemption order entered after *Louisiana PSC*. As a pre-

47. *Id.* at 430. As an example of a state regulation which could impede the federal goal of a competitive inside wiring market, the Court described a regulation which would permit telephone companies to bundle their inside wiring charges with charges for basic telephone service, thereby preventing consumers from making informed price-related choices among competing vendors of inside wiring services. *Id.*

48. *Id.*

49. Illinois Bell Tel. Co. v. FCC, 883 F.2d 104 (D.C. Cir. 1989) [hereinafter *CPE Sales Agency*].

condition to permitting Bell Operating Companies ("BOCs")[50] to sell CPE on an integrated basis instead of under *Computer II* structural separation, the FCC required, *inter alia*, that the BOCs provide a reasonable number of unaffiliated CPE vendors the opportunity to be BOC sales agents. Under such sales agency arrangements, unaffiliated CPE vendors would be able to sell their own CPE products in packages along with the BOCs' network services, as the BOCs' agents, the same way that the BOCs' affiliated CPE companies were then operating, and according to the same terms, conditions and commissions.[51] Further, to protect the FCC's pro-competitive CPE policy which the sales agency requirement was intended to support, the FCC also preempted *all* state regulations that were inconsistent with its set of BOC nonstructural safeguards, including the sales agency requirement.[52]

One BOC appealed on a number of different grounds, including that section 152(b) barred FCC preemption of state regulation of intrastate services that were sold under these CPE sales agency arrangements.[53] Justifiably, the D.C. Circuit found that Centrex service, the BOC network service most often sold under such agency arrangements, although itself arguably quite local in nature because it is universally tariffed solely at the state level, "supports both interstate and intrastate communications."[54] The court reasoned that a "federal right of access to the interstate communications network was, in fact, implicated in the provision of Centrex."[55] Accordingly, the court held that the subject matter of the FCC's preemption order was jurisdictionally mixed, rather than purely intrastate as argued by petitioners, and that therefore Section 152(b) under *Louisiana PSC* did not act as an express denial of FCC jurisdiction over the

50. The BOCs are the 22 local Bell telephone companies that were divested from AT&T as part of the Bell System consent decree on January 1, 1984. United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983).

51. Furnishing of CPE by the BOCs and Indep. Tel. Cos., Report and Order, 2 FCC Rcd. 143, 156 (1987).

52. *Id.* at 160.

53. *CPE Sales Agency*, 883 F.2d at 112-13.

54. *Id.* at 113 (quoting Furnishing of Customer Premises Equipment by the BOCs and the ITCs, Report and Order, 2 FCC Rcd. 143, 160 (1987)).

55. *Id.*

subject matter in the first instance.[56]

Coming then to the necessary next question of severability, the D.C. Circuit concluded that "the package of nonstructural safeguards the Commission has rationally chosen . . . including regulation of the manner in which Centrex and like network services are marketed jointly with CPE—does not appear capable of severance into discrete interstate and intrastate components."[57] Since the D.C. Circuit also agreed with the FCC that the Commission had "legitimately determined that *inconsistent* state regulation of joint CPE/service marketing would negate the valid federal goals of the order under review,"[58] the court upheld the FCC's preemption order.

Neither "treatment severability" nor "subject matter severability" probably would have been possible for the subject of the FCC's preemption in this case. However, one may ask why the court did not see this fact situation in the same manner as it saw inside wiring a month earlier in *NARUC III*, and did not find "regulation severability" to be feasible and therefore legally required. It appears that, conceivably, a state could have adopted a regulation that could co-exist with the FCC's sales agency rules without negating the FCC's pro-competitive CPE policy. For example, a state commission could have required monitoring of the number of unaffiliated CPE vendors with whom a BOC had entered into sales agency contracts, and could have required a minimum number of such contracts at all times, thereby helping ensure attainment of the FCC requirement of a "reasonable" number of such contracts. Any such state requirement would not be inconsistent with the federal goals established by the FCC, and it was only "inconsistent state regulation" that the FCC's order preempted. In contrast, the FCC's order in *NARUC III* preempted *all* state regulation over the installation and maintenance of inside wiring—not merely that which was inconsistent with federal regulation. On this basis, *NARUC III* and *CPE Sales Agency* can be reconciled.

A final, most interesting facet of the *CPE Sales Agency* decision comes from a brief point made in a footnote. The court stated: "Even if Centrex were a *purely intrastate* service, the

56. *Id.* at 113-14.
57. *Id.* at 115.
58. *Id.* at 116.

FCC *might well have authority* to preemptively regulate its marketing if—as would appear here—it was *typically sold* in a package with interstate services. *Marketing realities might themselves create inseparability*."[59] This language is important for two reasons. First, it indicates that at least one circuit has read *Louisiana PSC* as *not* barring FCC preemption of even a purely intrastate service where the state regulation results in the negation of a valid federal goal. Second, the language points up a fourth principle of severability, which for purposes of this Article will be called "inseverability of effect." In other words, the court acknowledged that there might be circumstances in which the plain realities indicate that the effects of state regulation cannot practically be limited to the state jurisdiction, and where that factor can support federal preemption. As will be seen in Part IV, *infra*, the Ninth Circuit may indeed have picked up this concept and breathed legal life into it.

E. ARCO

The next of the *Louisiana PSC* progeny was the *ARCO* case,[60] involving an FCC preemption order originally adopted prior to, but confirmed after, the *Louisiana PSC* decision. The FCC preempted a Texas PUC ruling which had prohibited Southwestern Bell Telephone Company (Southwestern) from providing a customer who operated a private microwave communications network with additional connections to the public switched network within Southwestern's franchised territory. The Texas PUC was concerned that, since the other end of this customer's private microwave network was located within a different telephone company's franchised area, Southwestern's compliance with the customer's request would in effect permit the customer to avoid dealing with that other telephone company entirely. The Texas Commission argued that the FCC could not preempt because to do so would amount to the assertion of federal regulation over the determination of local telephone company franchise boundaries—a matter reserved to exclusive state regulation for many years. The D.C. Circuit dis-

59. *Id.* at 113 n.7 (emphasis added).

60. Public Util. Comm'n of Tex. v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) [hereinafter *ARCO*] (the Atlantic Richfield Company (ARCO) was a principal party in the case, and thus this decision has generally come to be known as the "ARCO case").

agreed, noting that the Texas PUC's order on its face purported to apply to additional connections that indisputedly would be used by the customer for *both* intrastate and interstate communications.[61]

The first significant preemption aspect of this case was the court's express acknowledgement of "regulation severability."[62]

> Southwestern's inability to separate interstate from intrastate calls does not, by itself, justify pre-emption unless that technological inseparability also prevents the FCC from separating *its regulation* into interstate and intrastate components. When one bears in mind [that the] Texas PUC order prohibit[ed] Southwestern from laying *any* additional lines in Dallas, including those which would be needed by ARCO for placing *inter*state calls . . . as well as Southwestern's inability to distinguish between intrastate and interstate calls on its lines, the FCC reasonably treated this case as one in which 'it was *not* possible to separate the interstate and intrastate components of . . . [its] regulation.'[63]

ARCO is also significant from a preemption perspective in that the court declined to consider a possible way to effect severability which was raised for the first time on appeal. Some parties to the appeal argued that although Southwestern could not separately identify interstate and intrastate calls in this situation, ARCO could do so, and on that basis, separate federal and state regulation was possible, thus defeating federal preemption. While agreeing that this was indeed possible, the court stated: "The FCC bears the burden of showing that its pre-emption order is necessary on the basis of the record developed before it. The Commission is not, however, required to anticipate any conceivable argument that might be raised by intervenors on appeal."[64]

F. Maryland PSC

The 1990 *Maryland PSC*[65] case dealt with a dispute between the FCC and the Maryland Commission over the authority to regulate the price charged for a LEC service known as "DNP" or Disconnect-Nonpay, which is the disconnection of a

61. *Id.* at 1334.
62. *See supra*, Section III(C).
63. *ARCO*, 886 F.2d at 1334 (first emphasis added).
64. *Id.*
65. Maryland Pub. Serv. Comm'n v. FCC, 909 F.2d 1510 (D.C. Circuit 1990) [hereinafter *Maryland PSC*].

subscriber's telephone service for nonpayment of either intrastate or interstate service charges. The Maryland Commission challenged the FCC's post-*Louisiana PSC* preemption of Maryland's imposition of a $4.2 million surcharge on AT&T for DNP. The case is important because it appears to have interpreted *Louisiana PSC* in terms of a burden of proof issue.

The Maryland Commission argued on appeal that it might have been possible technologically to cut off a subscriber's interstate access without also cutting off intrastate access, thus establishing "subject matter severability" and defeating the FCC's preemption order. Recalling its earlier *ARCO* decision, however, the D.C. Circuit noted that, at the time it issued the order under appeal, "the FCC *believed* that such a separation was not practical."[66] Noting further that the Maryland PSC had not introduced any evidence before the FCC to cast doubt on the Commission's finding of inseverability, the Court went on to reject the state commission's claim on appeal: "[W]here the state has not suggested a means to unbundle the interstate and intrastate components of a matter, 'we have no basis to quarrel with the FCC's contention that no order could have accommodated both the local and federal regulatory interests.' "[67]

This language may suggest that the D.C. Circuit thinks that once the FCC has concluded that there is inseverability, the burden of proof shifts to the party asserting that severability is possible. If so, the Ninth Circuit apparently would disagree.

IV. *California I*—A Surprise that Wasn't

Although *California I*,[68] the Ninth Circuit's reversal of the first three FCC orders in *Computer III*,[69] is also perhaps properly viewed as one of *Louisiana PSC*'s progeny, the case is sig-

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66. *Id.* at 1516 (emphasis added).

67. *Id.* (quoting *ARCO*, 886 F.2d at 1334).

68. California v. FCC, 905 F.2d 1217 (9th Cir. 1990), [hereinafter *California I*].

69. The three orders were: (i) Amendment of Section 64.702 of the Commission's Rule and Regulations, Phase I Order, 104 F.C.C.2d 958 (1986), (ii) the Phase I Reconsideration Order, 2 FCC Rcd. 3035 (1987) and (iii) the Phase II Report and Order, 2 FCC Rcd. 3072 (1987). All were *vacated sub nom.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990). *See also* Memorandum Opinion and Order on Further Reconsideration (Phase II), 3 FCC Rcd. 1150 (1988); Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration (Phases I and II), 4 FCC Rcd. 5927 (1989) [hereinafter Computer III].

nificant enough to warrant separate discussion. It is often viewed as one of those "surprise" appellate cases, but the decision's preemption holdings certainly should not have caught the bar off guard.[70] To the contrary, when one realizes that *Louisiana PSC* was handed down two weeks *after* the FCC's first *Computer III* order was adopted[71] one sees that it was easy to predict at the time that the *Computer III* preemption orders were doomed. These FCC orders preempted *all* state tariffing of enhanced services sold by communications carriers, *all* state regulations requiring structural separation between a carrier's basic and enhanced service operations, and *all* state nonstructural safeguards that were inconsistent with or *more stringent than* the FCC's.[72]

The Ninth Circuit concurred with the rationale adopted by the D.C. Circuit in *NARUC III*, and held that section 152(b), by its own terms, applies not only to intrastate common carrier services but also to matters "in connection with intrastate communication service by wire or radio of any carrier."[73] Thus, the Ninth Circuit held that regulation of enhanced services—also previously determined by the FCC to be non-common carrier services—does not escape the section 152(b) reservation to state jurisdiction under the Act.[74]

However, unlike the D.C. Circuit, the Ninth Circuit appears to have been more willing to accept asserted bases of severability heard for the first time on appeal:

> [T]he state petitioners call our attention to voice mail services that

70. Perhaps the author was not alone in being surprised by the Ninth Circuit's reversal, by a divided panel, of the FCC's public interest determination that the *Computer II* structural separation rules should be replaced with the *Computer III* set of nonstructural safeguards for BOC provision of enhanced services. *See California I*, 905 F.2d at 1246.

71. The *Phase I Order* was adopted at the FCC's May 15, 1986 Open Meeting. *Louisiana PSC* was decided May 27, 1986.

72. *California I*, 905 F.2d at 1239. Enhanced services are offered over common carrier transmission facilities and employ computer processing applications that act on the format, content, code, protocol or similar aspects of a subscriber's transmitted information; provide a subscriber with additional, different, or restructured information; or involve subscriber interaction with stored information. 47 C.F.R. § 64.702(a) (1992). Basic services are essentially those communications transmission services that do not involve any enhanced characteristics.

73. *California I*, 905 F.2d at 1240 (quoting 47 U.S.C. § 152(b)(1)) (emphasis omitted).

74. *Id.* at 1240-42.

> are offered to discrete locales within a state . . . . The FCC does not explain how the structural separation of such purely *intra*state enhanced services from basic telephone service would interfere in any way with a carrier's ability to provide *inter*state enhanced service . . . on an integrated basis.[75]

Thus, the Ninth Circuit may place a heavier burden upon the FCC than the D.C. Circuit in terms of anticipating potential aspects of severability prior to issuing a preemption order.

A. *The "Impossibility Doctrine" Misnomer*

The court also noted the jurisdictionally mixed nature of most enhanced services, and thus was compelled to entertain the next issue in the post-*Louisiana PSC* preemption analysis: whether the subject matter was severable in some way and thus susceptible to the dual regulatory scheme, or inseverable and thus susceptible to federal preemption. Significantly, the Ninth Circuit picked up on one phrase in particular from *Louisiana PSC*, placing great emphasis on the Supreme Court's observation that the FCC's depreciation preemption in that case might have been valid were it "*not possible* to separate the interstate and intrastate components of the asserted FCC regulation."[76] From this phrase, the Ninth Circuit interpreted what it called an "impossibility exception" to the usual rule that section 152(b) "fences off" intrastate common carrier communication services from FCC reach. Thus, the court reasoned that only if it is "impossible" to sever the inter- and intrastate components of the subject matter at issue is it appropriate to go on to the third and final step in the post-*Louisiana PSC* preemption analysis, *i.e.*, whether the absence of preemption would negate a valid federal goal.

However, in the same footnote in *Louisiana PSC* from which the Ninth Circuit extracted the above "impossibility" language, the Supreme Court cited with approval the *NCUC I* and *NCUC II* cases. In *NCUC I*, the Fourth Circuit did not hold that preemption was appropriate only where it was "impossible" to sever the subject matter into separate inter- and intrastate components. To the contrary, *NCUC I* upheld federal preemp-

75. *Id.* at 1244.
76. *Id.* at 1243 (quoting Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 375 n.4) (emphasis added).

tion on the basis that "[*u*]*sually* it is not *feasible*, as a matter of *economics* and *practicality of operation*, to limit the use of [the telephone equipment at issue] to either interstate or intrastate transmissions."[77] This standard, at least implicitly endorsed by the Supreme Court in *Louisiana PSC*, may be viewed as considerably different from a required showing of "impossibility" of severability. Under the "impossibility" standard imposed by the Ninth Circuit, that court found that it was clearly not impossible to separate certain components of the FCC's asserted jurisdiction into separate inter- and intrastate components.[78]

B. The "Negation" Misnomer

The Ninth Circuit then went on to the required negation analysis and determined that there could be areas of legitimate state regulation related to enhanced services that would not necessarily negate any valid federal goal for such services. For example, the Court noted that there could be instances of "purely intrastate" enhanced services (those which never involved transmission across a state boundary), and that in such cases it would be hard to see how state regulation could possibly negate federal goals favoring integration of basic and enhanced interstate services.[79]

An important point here, however, is that even in post-*Louisiana PSC* cases, the courts have generally not used the term "negate" in the typical dictionary sense of the term. It is not necessary for the FCC to show that one of its policies would be completely nullified, voided, or rendered nugatory in the absence of federal preemption. To the contrary, the cases state clearly that negation of a federal goal can be found even where the preempted state regulation would merely "*thwart* or *impede*" at-

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77. North Carolina Util. Comm'n v. FCC, 537 F.2d 787, 791 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976) (emphasis added).

78. The Court noted that a state certainly could require only separate *corporate* identities for BOC enhanced service operations—not requiring any physical separation of equipment—without conflicting with the federal goal of integrated basic and enhanced carrier equipment. *California I*, 905 F.2d at 1244. It is important to note that the FCC did *not* assert the "impossibility" exception as a basis for its preemption of state authority to tariff enhanced services. *Id.* at 1242 n.38. Thus we still do not know how the law may develop on that issue. *See* discussion *infra* in part V(A).

79. *California I*, 905 F.2d at 1244.

tainment of the FCC goal.[80] Indeed, even the *California I* Court acknowledged this fact.[81] Clearly, this is a much more lenient standard than the common use of the term "negate" in such cases might otherwise indicate.

C. "Inseverability of Effect"

California I also appears to have validated the "inseverability of effect" principle alluded to above in Part III(D) of this Article. The Ninth Circuit observed that "a state-imposed requirement that carriers use separate physical facilities for all basic telephone and enhanced services offered on an intrastate basis would almost certainly *force* carriers to separate their interstate services as well."[82] The court acknowledged that if the *effect* of a state regulation, even though by its terms strictly limited to the intrastate component of the subject matter, was such that a carrier's interstate operations would as a practical matter be affected in a manner inconsistent with federal policy, then such state regulation could be found to be inseverable from the related federal regulation. Due to its inherent breadth, this principle could have significant impacts upon future preemption cases, and is therefore one which may bear close attention going forward as new cases are decided.

Despite the observation that it is not quite as difficult for the FCC to preempt today as some would contend, the FCC nevertheless now faces a decidedly uphill trek compared to the pre-*Louisiana PSC* days of "blanket" preemption. Precisely how difficult FCC preemption will be in the future may be determined in great part by the current generation of preemption cases that are either now before the FCC or are already on appeal. Before moving to a discussion of this current generation of cases, it may be beneficial to summarize what appears to be the current state of FCC preemption law.

D. Summary of Current Preemption Law

Under current preemption law as applied to FCC cases, there appears to be a three-step analysis, as follows:

80. *See, e.g.*, National Ass'n of Regulatory Util. Comm'ns v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989) (emphasis added).
81. *California I*, 905 F.2d at 1243.
82. *Id.* at 1244 (emphasis added).

(1) A court first will examine whether the subject matter is purely intrastate in nature or is jurisdictionally mixed. If the court determines that the matter is purely intrastate, it is likely that the inquiry will end there with federal preemption being overturned.

(2) If the matter is found to be jurisdictionally mixed, the court will probably then explore whether there is any feasible way, as a matter of economics and practicality of operation, to allow for co-existing state and federal regulation over the subject matter,[83] whether accomplished via treatment severability, subject matter severability, regulation severability, or some other means of severance not yet identified by the cases. If the subject matter is found to be severable, preemption will be reversed, unless the court also finds that there is "inseverability of effect" (*i.e.*, where even after severance there will be an inevitable effect of state regulation over the intrastate component upon the interstate component of the subject matter).

(3) If the court determines either that there is inseverability, or "inseverability of effect," it then will turn to an analysis of whether the preempted state regulation would necessarily negate (*i.e.*, "thwart or impede") attainment of some valid federal goal. If the court finds such negation, federal preemption likely will be upheld.

V. "*CALIFORNIA II*" AND THE FUTURE

A. "California II" *and Related Cases*

As explained above, in *California I* the Ninth Circuit reversed all three of the FCC's *Computer III* preemption holdings (preemption of all state tariffing of enhanced services sold by communications carriers, all state regulations requiring structural separation between a carrier's basic and enhanced service operations, and all state nonstructural safeguards that were inconsistent with or more stringent than the FCC's).[84] On remand, the FCC decided to reconsider only the latter two areas, expressly declining to reconsider preemption of state tariffing of

83. The Ninth Circuit may simply explore whether it is "impossible" to sever the subject matter.

84. *California I*, 905 F.2d at 1239 n.40.

enhanced services.[85] Although the Commission again preempted in both the structural separation and nonstructural safeguards areas, it did so much more narrowly than in *Computer III*.

In keeping with the Ninth Circuit's mandate that FCC preemption focus with specificity upon only those forms of state regulation that are inseverable from interstate areas and that would necessarily negate a valid federal goal if not preempted, the FCC on remand painstakingly sought public comment on numerous subparts of potential state regulation.[86] With respect to each such area of potential conflicting state/federal jurisdiction, the FCC asked commenting parties whether severance was feasible as a matter of economics and practicalities of operation. Thus, the FCC adopted the Fourth Circuit language of *NCUC I & II* rather than the "impossibility" language used by the Ninth Circuit in *California I*.[87]

Regarding the structural separation issue, the FCC decided on remand to preempt "state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services."[88] It did so based upon the previously-discussed tests of inseverability and negation. Interestingly, although the FCC did not preempt with respect to any "purely intrastate" enhanced service, it did imply that it might be able to preempt even that type of enhanced service under the right circumstances, perhaps under the principle of "inseverability of effect."[89]

With respect to nonstructural safeguards, the FCC scaled

85. Computer III Remand Proceedings: BOC Safeguards and Tier 1 LEC Safeguards, Report and Order, 6 FCC Rcd. 7571, 7625 (1991) [hereinafter *BOC Safeguards Order*]. The FCC decided to review the *Computer III* rulings related to its Open Network Architecture (ONA) requirements in a separate remand proceeding. *See* Computer III Remand Proceedings, Notice of Proposed Rulemaking, 5 FCC Rcd. 5242 (1990); Computer III Remand Proceedings, Report and Order, 5 FCC Rcd. 7719 (1990).

86. The Commission sought comment on the areas of structurally separate "(1) communications facilities and equipment, (2) computer facilities and software, (3) other facilities, such as real estate and vehicles, (4) general management, (5) operations, (6) marketing, (7) installation and maintenance, and (8) research and development." *BOC Safeguards Order*, *supra* note 85, 6 FCC Rcd. at 7626 n.216.

87. *Id.* at 7632-35.

88. *Id.* at 7630-31.

89. "Based on the record in *this* proceeding, we do not *now* think that applying state structural separation requirements to purely intrastate enhanced services would

back considerably from its original *Computer III* levels of preemption, asserting primacy over only one aspect of its customer proprietary network information ("CPNI") rules,[90] and one aspect of its network disclosure rules. On remand, although the FCC's CPNI rules are multi-faceted, the Commission decided to preempt only with respect to the prior authorization aspect of those rules: "[W]e preempt state CPNI rules . . . that require prior authorization whenever such authorization is not required by our rules."[91] It did so using an inseverability of effect-type rationale: "Carrier implementation of a state prior authorization rule where it is not required under the federal rule would *effectively require* the separation of marketing and sales personnel dealing with interstate enhanced services from personnel dealing with interstate basic services."[92]

With respect to the network disclosure rules, on remand the FCC preempted only to the extent necessary to prevent a state from requiring a first date of publication regarding technical changes to BOC networks that is different from the date required under federal rules.[93] The Commission noted that it was not possible to have more than one first date of publication, and that a state rule imposing a different date could negate the federal goals supported by the FCC's network disclosure rules.

The *BOC Safeguards Order*, including its various preemp-

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necessarily thwart our objectives for interstate enhanced services." *Id.* at 7632 (emphasis added).

90. CPNI is customer-specific information that LECs have in their files because of their status as franchised providers of local exchange service to all within their assigned territories. The FCC originally ruled in *Computer III* that, in order to spread enhanced services to the masses while at the same time not infringing on customers' reasonable expectations of privacy, BOCs would be able to use CPNI to market enhanced services without prior written customer permission, but unaffiliated ESPs would have to procure such prior written customer permission to obtain CPNI from a BOC. *Phase I Order*, *supra* note 69, 104 F.C.C.2d at 1089-92. More recently, the Commission has modified this rule somewhat, requiring that the BOCs obtain written customer permission before using CPNI of customers with over twenty lines. *BOC Safeguards Order*, *supra* note 85, at 7609; Memorandum Opinion and Order, 7 FCC Rcd. 2999 (1992).

91. *BOC Safeguards Order*, *supra* note 85, 6 FCC Rcd. at 7636.

92. *Id.* (emphasis added). At least one court has been called upon to enforce this particular FCC preemption ruling, which it did despite the state commission's attempt to fashion a state CPNI prior authorization rule that avoided federal preemption. Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas, No. A-92-CA-270, (W.D. Tex. Jan. 15, 1993).

93. *Id.* at 7636-37.

tion holdings, is now on appeal before the Ninth Circuit in what many are already calling "*California II*" even though there has been no decision yet in those appeals.[94] Needless to say, the decision on appeal could have a profound impact upon the law of preemption in the FCC field. For instance, if the Ninth Circuit were to disagree with the Fourth Circuit that the proper test for severability is "feasibility as a matter of economics and practicality of operations," there could be a split among circuits of a rather significant nature, possibly necessitating another Supreme Court decision in the near future. On the other hand, if the Ninth Circuit expressly upholds the FCC's application of the "inseverability of effect" rationale for asserting preemption, that could provide important legal support for a potentially expansive use of future FCC preemptive power.

A significant related case also now on appeal is *Georgia MemoryCall.*[95] During 1991, the Georgia Commission was conducting an investigation into allegations of anticompetitive conduct by Southern Bell Telephone Company in its provision of MemoryCall service (electronic voice mailbox service, which is an enhanced service under FCC rules), and on June 4, 1991 decided to issue a "freeze" on all further sales of that service pending its investigation.[96] BellSouth (Southern Bell's parent company) filed a Petition for Emergency Declaratory Relief with the FCC seeking an order that the *Georgia Freeze Order* was preempted. The FCC agreed with BellSouth and issued such an order.[97] Georgia's appeal is still pending in the Eleventh Circuit as of this writing.

The significance of this case emanates from what appears to be a critical difference of opinion between the federal and state commission concerning what constitutes a "jurisdictionally

94. Appeals pending *sub nom.* California v. FCC, No. 92-70083 and Consolidated Cases (9th Cir.), filed February 14, 1992 [hereinafter *California II*].

95. Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corporation, Memorandum Opinion and Order, 7 FCC Rcd. 1619 (1992) [hereinafter *Georgia MemoryCall Order*], *appeal pending sub nom.* Georgia PSC v. FCC, No. 92-8257 (11th Cir.), filed March 16, 1992 [hereinafter *Georgia MemoryCall*]. Appeals of the same FCC order were also filed by the California and New York Commissions in the Ninth Circuit, but they were dismissed due to lack of standing on June 26, 1992.

96. In the Matter of the Commission's Investigation into Southern Bell Telephone Company's Provision of MemoryCall Service, Order of the Commission, Georgia Docket No. 4000-U [hereinafter *Georgia Freeze Order*].

97. *Georgia MemoryCall Order*, *supra* note 95.

mixed" service for federal preemption purposes. Georgia's basic position apparently is that, although parties from other states admittedly can call MemoryCall subscribers in Georgia and thereby make use of the MemoryCall service, the call-forwarding link from the Southern Bell end office in Georgia to the MemoryCall computer in Georgia is nonetheless a local service that is tariffed solely in the state. From there, Georgia reasons that MemoryCall itself must of necessity also be a purely local service subject to exclusive state jurisdiction. Thus, even in the case of an out-of-state caller contacting a MemoryCall subscriber in Georgia, the Georgia Commission asserts that MemoryCall is a purely intrastate service subject only to state jurisdiction.

The FCC, on the other hand, has taken the position that MemoryCall is a jurisdictionally mixed enhanced service because it views calls that originate in another state and terminate in a MemoryCall computer in Georgia as interstate in nature. The federal commission points to Communications Act language giving it jurisdiction over all interstate communications "*between the points of origin and reception of such transmission, including the instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.*"[98] Concluding based upon the record that there was also no feasible way to separate intrastate and interstate MemoryCall-related transmissions, the FCC held that the Georgia freeze as a practical matter banned not only intrastate but also *interstate* sales of MemoryCall service, which negated the valid federal goal of proliferating interstate enhanced services like MemoryCall.[99]

Although of course impossible to predict, it appears that the appellate decision in this case may turn on a distinction be-

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98. *Id.* at 1621 (quoting 47 U.S.C. § 153(a)).

99. *Id.* at 1622-23. The FCC also relied upon the "inseverability of effect" principle, identified *supra*, Section IV(C), in preempting the *Georgia Freeze Order*:

> Apart from the foregoing, it is not realistic to expect that the carrier will undertake the expense and difficulties of seeking to offer an interstate-only voice mail service on a temporary basis. Instead, as is the case before us, the carrier will halt all sales of the service for both interstate and intrastate use, depriving customers of an interstate telecommunications capability they want. Effectuation of the state bar thus will, as a practical matter, bar the interstate provision of the service as well as the intrastate provision.

Id. at 1622 (footnote omitted).

tween the FCC's right to impose *tariff* regulation upon a service that seems to be local in nature, as opposed to its right to impose other sorts of regulation upon such services. Georgia is of course correct in stating that the call forwarding and local exchange services that supply the terminating link of a MemoryCall transmission are currently tariffed exclusively by the states. But the FCC does not appear to be basing its preemption here upon any asserted right to require federal tariffing of such local services under Title II of the Communications Act. Rather, it is preempting based upon its *general* Title I authority for "regulating interstate and foreign commerce in communication by wire,"[100] with "communication by wire" being statutorily defined as including even "the receipt, forwarding, and delivery of communications . . . between the points of origin and reception."[101] In a pre-*Louisiana PSC* case, the D.C. Circuit held that this particular provision of the Act "explicitly creates FCC jurisdiction over *all* 'facilities' and 'services' used at *any* point in completing an interstate telephone call."[102]

The problem the FCC has with Title I-based preemption is, of course, that at least one circuit has now held that the FCC's general Title I authority is expressly subordinated to the section 152(b) reservation of authority to the states over charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.[103] But even that weighty prohibition might be overcome under the current law where the FCC can show inseverability of effect. Furthermore, nothing in *Louisiana PSC* indicates the Supreme Court's intention to alter its earlier ruling that it is the nature of the communication—not the location of the facilities—that creates federal jurisdiction under the Act.[104] Moreover, the FCC has never ceded authority to the states even regarding tariff regulation over such "inherently local" services as call forwarding. In

100. 47 U.S.C. § 151 (1988).

101. 47 U.S.C. § 153(a) (1988). The FCC must support its preemption order here with Title I rather than Title II power because it reclassified enhanced services as non-common carrier services not subject to Title II jurisdiction in *Computer II*. *See supra* note 16 and accompanying text.

102. National Ass'n of Regulatory Util. Comm'rs v. FCC, 746 F.2d 1492, 1499 (D.C. Cir. 1984) (emphasis added).

103. California v. FCC, 905 F.2d 1217, 1240-42, 1240 n.35 (9th Cir. 1990).

104. United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968).

fact, even since *Louisiana PSC*, the FCC has expressly reserved the right to perhaps someday assert tariff regulation over such traditionally state-tariffed services.[105] Thus, the FCC certainly is not lacking in legal arguments to support its position.

In any event, industry observers should not lose sight of the fact that *Georgia MemoryCall* involves the most fundamental question of what constitutes interstate versus intrastate communications service. If the Georgia Commission can convince the Eleventh Circuit that MemoryCall is indeed "purely intrastate" in nature, even on the terminating end of a call that admittedly originated in a different state, there could be ramifications flowing far beyond just a possible reversal of the subject preemption order.[106] For this reason, *Georgia MemoryCall* is a potentially very important case.

The *Georgia Freeze Order* was not the Georgia Commission's only venture into this particular legal arena. About one year later, on May 13, 1992, with its *Freeze Order* still on appeal, the Georgia PSC entered an order requiring Southern Bell to establish separate marketing for "jurisdictionally intrastate" MemoryCall service.[107] Apparently a much clearer and cleaner legal issue than in the case of the *Freeze Order*, BellSouth was able to obtain a temporary restraining order in federal district court the following day.[108] The court found that a state's requirement for separate marketing of intrastate enhanced services was expressly preempted by the *BOC Safeguards Order* and entered its order accordingly. It remains to be seen what effect, if any, this order may have on Georgia's pending appeal of the FCC's MemoryCall preemption order, but the potential for an adverse effect motivated the two dissenting votes on the Georgia Commission.[109]

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105. Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd. 1, 144 (1988).

106. Note that even if successful on this argument, Georgia might not escape affirmance of the subject preemption order, since the Court could follow an "inseverability of effect" rationale to uphold the FCC preemption order despite a previous conclusion that MemoryCall is a purely intrastate service.

107. Order in Ga. Pub. Serv. Comm'n Dkt. No. 4000-U (May 13, 1992).

108. BellSouth Telecommunications, Inc. v. Georgia Pub. Serv. Comm'n, No. 1 92-CV-1127-MHS (N.D. Ga. May 14, 1992).

109. Order in Ga. Pub. Serv. Comm'n Dkt. No. 4000-U (dissent of Commissioner Robinson and Chairman Rowan).

In a final current case related to *California II*, the FCC still has before it a January 30, 1991 Petition for Declaratory Ruling, filed by sixteen non-Bell enhanced service providers, asking the Commission to declare that the states and the District of Columbia are preempted from imposing public utility regulation on both carrier and noncarrier-provided enhanced services. "Public utility regulation" is defined in the Petition as state "entry and exit regulation and tariff requirements."[110] The Commission collected public comment on this Petition in early 1991 but has not issued an order as of this writing.[111] In the interim, at least nine states have asserted some form of tariff regulation over some or all intrastate enhanced services,[112] and, as of this writing, at least several others were reported to be considering the same course.

It is not difficult to see why the FCC would be reluctant to grant the relief sought in this Petition, no matter how much the Commission may desire that enhanced services remain unregulated in the United States. Any one or a combination of "treatment severability," "subject matter severability," and/or "regulation severability" may be available to the states as the basis or bases for defeating federal preemption of state enhanced service tariff regulation. Common sense alone would seem to prompt the question "What is different about enhanced services that makes dual federal/state regulation less workable for them than for basic communications services?" Indeed, in response to the FCC's alternative argument in *California I* that the Commission's Title I ancillary jurisdiction (under which the FCC asserted general authority over enhanced services), was not intended to be limited by the section 152(b) reservation of state authority, the Ninth Circuit held that "[t]here is nothing in the language of the [Communications] Act to suggest that the 'dual regulatory system' established by Congress contains an excep-

110. FCC Preemption of Entry and Exit Regulation and Tariff Requirements on Carrier Affiliated and Noncarrier Affiliated Enhanced Service Providers, DA 91-223, Petition for Declaratory Ruling of ADAPSO et al., 2 (petition date Jan. 30, 1991).

111. Petition for Declaratory Ruling that States and the District of Columbia are Preempted from Imposing Public Utility Regulation on Enhanced Services Providers, Public Notice, 6 FCC Rcd. 1363 (1991).

112. California, Delaware, Florida, Iowa, Minnesota, New York, Oregon, South Carolina and Tennessee.

tion for Title I regulation."[113]

Nevertheless, there may still be a legally valid basis for federal preemption of state enhanced service tariff regulation, depending upon how far a court might be willing to go under the principle of "inseverability of effect." For example, the FCC could attempt to gather a record showing that a substantial number of large enhanced service providers would choose either to eliminate or limit significantly their interstate enhanced offerings in any state that asserted tariff regulation over intrastate enhanced services. The record gathered to date in the above-mentioned FCC proceeding tends to indicate that such might be the case, simply because many large enhanced service providers assertedly will not accept the administrative burdens of tariff regulation, nor the operational challenges of attempting to offer only interstate services within a given state. With such a record, the FCC might be able to establish a strong case that, even though intrastate and interstate enhanced services are perhaps separately regulable in one manner or another, there is an inseverable, impeding effect of intrastate tariff regulation upon the proliferation of interstate enhanced services. Since the FCC has already created a judicially approved record that the proliferation of interstate enhanced services is a valid federal policy goal,[114] such an impeding effect of state tariff regulation over even purely intrastate enhanced services might support federal preemption of such state regulation under the "inseverability of effect" principle.

It could be that the FCC is reluctant to attempt preemption on such a basis since there has been no hue and cry that interstate enhanced service development is being impeded significantly despite the fact that nine states are already regulating enhanced services under tariff. Or, it could be that the FCC is merely waiting to see what the ultimate effect of state tariff regulation will be upon interstate enhanced service development. In any case, this is a potentially important issue within the world of enhanced services, and in the area of preemption law, and thus we may see still further legal activity in the area.

113. California v. FCC, 905 F.2d 1217, 1241 n.35 (citation omitted).

114. *Id.* at 1231-32, 1238.

B. The Future

It seems doubtful that the FCC is destined ever to relinquish its congressionally delegated authority for development of national telecommunications policy in this country, nor would it seem appropriate for the FCC to do so. Yet, with each passing year since *Louisiana PSC*, there seem to be increasingly more instances of state regulation over areas which probably would have been within the exclusive province of the federal commission prior to that landmark decision. It could become most difficult for the FCC to effectively establish national communications policy in an environment so open to individual regulation by each of the many states.

At least a few things seem clear. To continue with its statutory mandate in an effective manner, the FCC would certainly benefit from judicial clarification (or perhaps some would say, "reconfirmation") of the FCC's interpretation of what constitutes a jurisdictionally mixed communications service. *Georgia MemoryCall* is a candidate that could serve as a timely vehicle for that purpose. If such clarification/reconfirmation is not forthcoming, there is a potential for regulatory chaos, with each state asserting its jurisdiction over what it views as "intrastate" communications service. If the courts permit this situation to develop, that could be the point at which the FCC finally feels compelled to assert primary jurisdiction over services that it historically has left to state regulation. It is hard to imagine that such a confrontation would be beneficial to the industry.

Presuming that the courts provide clarification/ reconfirmation of the meaning of a jurisdictionally mixed service, the FCC's next concern might well be how to build a legally viable preemption order that is broad enough to effectuate a national policy, rather than consisting of only specific, narrow regulatory requirements. The principle of "inseverabilty of effect" discussed throughout this Article may be one effective tool for this purpose. Thus, we may see with increasing frequency FCC proceedings that seek public comment on potential impeding effects upon interstate policies emanating from state regulations over even purely intrastate services.[115]

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115. However, if this should become a judicially accepted basis for FCC preemption going forward, then one might fairly ask whether we would have come full circle

In addition to (or possibly instead of) relying upon the "inseverability of effect" principle, the FCC might also try to continue crafting national communications policy by merely avoiding adoption of regulations that are susceptible to any of the legally recognized means of severability. This could prove a daunting task indeed, but it may be all that the FCC is left with if the courts do not grant considerable weight to "inseverability of effect." Under this scenario, the federal commission might have to try to anticipate literally every possible way that the subject matter in question could be divided into separate spheres of federal and state regulatory oversight, and then preempt only in those areas that were not vulnerable to such severability.[116] While this approach may leave an FCC preemption order with enough scope to effectively implement national policy in some cases, it seems doubtful that the approach would suffice in all cases of desirable national policy.

Thus, unless the courts recognize some viable means by which the FCC can continue to effect national communications policy, the industry may be faced with the possibility of proposed legislative revisions to the Act and specifically, a clarification of section 2(b). Should it come to this, of course, the inevitable ensuing political debate between federalism and states' rights could become quite involved, and rather unpleasant for all concerned. Such a development can still be avoided by insightful FCC and court decisions in the several key pending cases discussed herein, but given the road that has led the law to its current status, such decisions may present a considerable challenge.

VI. CONCLUSION

Because of *Louisiana PSC* and its progeny, the FCC faces an uphill battle in crafting legally viable preemption orders that support implementation of national communications policy on a going forward basis. There are a number of pending cases—before both the FCC and the appellate courts—which could fur-

at that point, back to the "substantially affects" test of *CCIA v. FCC*. *See supra* text accompanying note 17.

116. As noted *supra* in text accompanying notes 44-52, there may be a difference of opinion among the circuits in terms of the degree to which the FCC must anticipate every possible aspect of severability prior to issuing a preemption order.

nish clarification that would return a measure of preemption authority to the FCC without unduly infringing upon state authority. However, that is a challenging proposition indeed.

A number of critical legal decisions need to be rendered, including: a clarification or reconfirmation of the definition of a jurisdictionally mixed communications service; a consensus position on the extent of inseverability required to support a preemption order; further clarification of the extent to which the FCC has the burden of anticipating every possible means of potential severability prior to issuing a preemption order; and clear law on when and how "inseverability of effect" will support preemption over a purely intrastate subject matter. A continued lack of such decisions will, in the best case, extend the current jurisdictional uncertainty that is impeding deployment of desirable new "information age" services, or, in the worst case, result in the possibility of legislative intervention in the highly volatile area of balancing federalism against states' rights under the Constitution.

Gender Preferences

Lorna Veraldi* and Stuart A. Shorenstein**

I. INTRODUCTION

Jerome Thomas Lamprecht's quest for an FM license was long, costly, and ultimately fruitless. He and his opponents filed mutually exclusive applications to build an FM station in Middletown, Maryland in 1982. Discovery for the resulting comparative licensing proceeding was completed in early 1984. After a hearing, an Administrative Law Judge (ALJ) awarded the license to Lamprecht's female opponent. The ALJ minced no words in giving the female applicant a "substantial preference" over Lamprecht:

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> On this criterion, Lamprecht suffers from a birth defect: he was born a white, Anglo-Saxon, male. They are not in demand under the Commission's present deregulatory, comparative scheme . . . . There was a day, in the dim and distant past, when Lamprecht might well have prevailed in this comparative contest. His educational background is broadcast oriented. He has both management and nonmanagement experience. He is a young man who appears aggressive enough to make a substantial contribution to his chosen career. In short, he's ready for an ownership role. But, in this day and age, it is doubtful that he could win a comparative proceeding.[1]

Lamprecht's "birth defect," however, would soon be cured. In 1985, in a case of first impression, the Court of Appeals for the District of Columbia Circuit found the FCC's gender preference unconstitutional. The court, though less than unanimous, was strident in its denunciation of the policy:

> As we have noted, the constitutional prohibition of discrimination on the basis of race or sex is founded on the presumption that a person should be judged as an individual rather than as a member of a particular group, and that no assumptions can or should be made about an individual's bent of mind merely because of a birth characteristic such as sex or race. Yet the Commission attempts to justify its policy solely by reversing this presumption and asserting precisely the opposite. Perhaps because the presumption is so questionable as a matter of fact and so offensive as a matter of principle, the Commission has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. Instead, a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded. *See* Gainesville Media, Inc., 70 F.C.C.2d 143 (Rev. Bd. 1978). Presumably, the Board thought that it was a Good Idea and would lead to a Better World. Contrary to the Commission's apparent supposition, however, a mandate to serve the public interest is not a license to conduct experiments in social engineering conceived seemingly by whim and rationalized by conclusory dicta.[2]

Neither the ALJ's decision against Lamprecht nor the Circuit Court's 1985 ruling was the end of the story about the FCC's gender preference policy. That story, viewed against a backdrop

1. Jerome Thomas Lamprecht, Decision, 99 F.C.C.2d 1229, 1239 and n.11 (1984).

2. Steele v. FCC, 770 F.2d 1192, 1199 (D.C. Cir.), *vacated en banc* No. 84-1176 (Oct. 31, 1985). Then-circuit-judge Scalia joined in the *Steele* opinion. This decision was subsequently vacated in an unreported en banc decision by the appeals court. *See* *FCC Imperils Minority Preference Policy*, BROADCASTING, Sept. 22, 1986, at 42.

of complex institutional and personal relationships between the courts, the Congress, and the FCC, is one of politics and policy-making working together to seek noble ends by constitutionally suspect means.

II. The Evolution of the Gender Preference

If ever a policy was vulnerable to challenge on the basis of the record on which it was adopted, it was the FCC's gender preference policy. No public notice was given of the FCC's intent to make a rule awarding preferences to women in the comparative licensing process, nor was there a rulemaking proceeding. Rather, the FCC's staff plucked the gender preference policy out of thin air; as the court put it, "[A] few Commission employees without any evidence, reasoning or explanation, gratuitously decreed one day that female preferences would henceforth be awarded."[3]

The Communications Act of 1934 does not specifically set forth how the FCC is to decide among competing applicants. The FCC over the years has established criteria under its broad "public interest" mandate, most importantly in its 1965 Policy Statement on Comparative Broadcast Hearings. One of the seven general criteria set forth in the 1965 Policy Statement is integration of ownership into management, which has, over the years, been enhanced by various other factors: local residence, past participation in civic affairs, daytimer status, past broadcast experience, and in the 1970s, ownership and proposed management by members of minority groups and women.[4]

In 1978, the FCC outlined a policy geared toward increasing ownership of broadcast stations by racial and ethnic minorities. It adopted a "distress sale" policy, allowing stations which could not normally be sold because their licenses had been designated for renewal or revocation hearings to be sold to a minority owner at less than full market value. The FCC also announced that broadcasters who sold their stations to minority owners would be eligible for special tax certificates. Further, the FCC

3. *Id.*

4. Policy Statement on Comparative Broadcasting Hearings, 1 F.C.C.2d 393 (1965). The criterion of integration itself recently has been attacked in the courts. Flagstaff Broadcasting Foundation v. FCC, 979 F.2d 1566 (D.C. Cir. 1992); Bechtel v. FCC, 957 F.2d 873 (D.C. Cir.), *cert. denied* 113 S.Ct. 57 (1992).

decided that minority group members would be given preferences in comparative licensing proceedings. The FCC's 1978 Policy Statement on Minority Ownership[5] grew out of a 1977 Commission conference on minority ownership policies, the FCC's 1978 Minority Ownership Task Force Report, and a petition filed with the Commission in 1978 that proposed minority ownership policies—all of which convinced the Commission that it needed to encourage more minority ownership. More importantly, the Court of Appeals, in *TV 9 v. FCC*,[6] had ruled in 1974 that minority ownership should be afforded merit in comparative hearings. Significantly, the Commission did not in its 1978 statement extend its new policies to women, nor had the courts ever found that women should be given a comparative preference.

Oddly, the Review Board took it upon itself to adopt a preference for women in the absence of any directive from the Commission or the courts and without any fact finding to support such a drastic change in the rules that had previously governed comparative proceedings. In 1978, the Review Board simply announced that it would henceforth apply a female preference in comparative licensing decisions. The Commission had framed policies aimed at encouraging *minority* ownership; the Review Board, without further consideration, presumed that *female* ownership deserved similar treatment.

The announcement came during Review Board reconsideration of a decision in which the Board initially declined to consider the public interest benefits of female ownership because there was no evidence in the record of the extent of female ownership in the community in question. The Board "had no basis on which to conclude that [female] participation would achieve a public interest benefit."[7] Suddenly, with no further fact finding, but merely "[u]pon further reflection," the Review Board decided upon reconsideration that it should take female ownership and participation into account after all.[8] The Review Board's

5. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978).

6. TV 9, Inc. v. FCC, 495 F.2d 929, 937-38 (D.C. Cir. 1973), *cert. denied* 419 U.S. 986 (1974).

7. Gainesville Media, Inc., Memorandum Opinion and Order, 70 F.C.C.2d 143, 149 (1978).

8. *Id.*

sudden discovery of a female preference did not change the outcome of the comparative proceeding in which the gender preference was first embraced. It did, however, substantially alter the course of future comparative hearings and possibly the makeup of many future applications structured to exploit the gender preference.

Soon after it discovered the gender preference in the *Gainesville* reconsideration, the Review Board was busy expanding the doctrine. Within two weeks of release of the *Gainesville* opinion, the Board, in another comparative proceeding, explained its preference for women in the following terms:

> We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation, but that it is a merit of lesser significance. The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value. On the other hand, it is equally obvious that the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks—women have not been excluded from the mainstream of society as have black people. To the extent that any significant population group is more fully integrated into the society as a whole, the need to promote ownership-participation by the members of that group in broadcasting diminishes.[9]

Within a short time, the Review Board had another chance to discuss the gender preference. In a different 1978 comparative proceeding, the Board granted merit for ownership by an African-American woman. The Board stated that it was obliged "to consider minority (and, presumably, female) ownership and participation as qualitative attributes of integration of ownership and management."[10] Thus, the female preference grew and expanded as the result of a "presumption."

III. Challenges to the Female Preference

The gender preference was soon attacked. James U. Steele

9. Mid-Florida Television Corp., Decision, 70 F.C.C.2d 281, 326 (1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).

10. Alexander S. Klein, Jr., Decision, 69 F.C.C.2d 2134, 2146 (1978), *aff'd*, 86 F.C.C.2d 423 (1981) (citing WPIX, Inc., Decision 68 F.C.C.2d 381 (1978)).

challenged the FCC's female preference after losing a comparative hearing for a new FM station at St. Simons Island, Georgia. Among Steele's competitors for the license was a woman whose "100% female integration," according to the Review Board, was "decisively important" to her victory.[11]

Steele proposed to live in the community and serve as the new station's full-time manager if he were awarded the license. He had earned undergraduate and master's degrees in communications and had more than twenty years of broadcast industry experience. Further, he had no other media ownership interests.[12]

His female opponent had no college degree and only four months of related experience working at a Baxley, Georgia AM station owned by her father. Her family had extensive broadcast and cable holdings in Georgia. She held stock in three family-owned cable television systems in Georgia but promised to divest herself of those holdings if she were granted the FM station in St. Simons.[13] Even though her husband owned her proposed transmitter site, had committed joint funds to finance the station, and would serve as his wife's full-time assistant general manager, he was not credited with any ownership interest because he was considered simply an employee of the new FM station. The decisive significance of the applicant's gender, acknowledged by the Review Board, set the stage for a frontal attack on the gender preference in the D.C. Circuit Court of Appeals.

In a colorful decision by Judges Tamm and Scalia, the majority found the policy invalid,[14] over the embittered dissent of Judge Wald. The oral argument had been the setting for several lively colloquys between Judges Scalia and Wald over the Commission's action, highlighting the division among members of the court over the issue of gender-based government policies.

The majority opinion contrasted the FCC's adoption of minority preferences, and congressional endorsement of such preferences, with the haphazard appearance of the gender preference, which was in apparent discord with congressional

11. Steele v. FCC, 770 F.2d 1192, 1194 (D.C. Cir.), *vacated en banc* (1985).
12. *Id.* at 1193.
13. *Id.* at 1193, 1193 n.2.
14. *Id.* at 1199.

action on the same issue. The majority noted that Congress, in amending the Communications Act of 1934 to provide for lottery selection among competing broadcast license applicants, had expressly determined not to weight such a lottery in favor of women; Congress *did* require that any lottery be weighted in favor of specified racial and ethnic minorities. As the court noted in *Steele*, "Congress's withdrawal of the authority to award preferences to 'underrepresented' groups such as women in the random lottery system might even be interpreted as indicating congressional disapproval of gender-based preferences in the comparative hearing process."[15]

The majority noted that the FCC's rationale for the gender preference—"fostering diversity of viewpoint in the mass media"—was problematic for two reasons:

> First, the assumptions and premises themselves have never been critically examined by the courts, Congress, or the Commission. Second, to the extent that they are discernible, they run counter to the fundamental constitutional principle that race, sex, and national origin are not valid factors upon which to base government policy.[16]

The court held that the assumptions upon which the preference rested were unreasonable. Granting preferences to women could not be expected to increase diversity. "Women transcend ethnic, religious, and other cultural barriers;" consequently, "it is not reasonable to expect that a woman would manifest a distinctly 'female' editorial viewpoint."[17]

Judge Wald, in dissent, first argued that the court should defer to the FCC's determination of broadcasting policy, using the "supple instrument"[18] given it by Congress in the "public interest" standard. Further, she stated that diversity of ownership is the only permissible means the FCC has of promoting content diversity because the FCC may not mandate the broadcast of "particular moral, social or political viewpoints."[19] Judge Wald then launched a scathing attack on the majority's characterization of the FCC's rationale:

> [T]he majority . . . [reduces the F.C.C.'s reasoning] to a simplistic,

15. *Id.* at 1196-97 n.4 (emphasis omitted).
16. *Id.* at 1198.
17. *Id.* at 1199.
18. *Id.* at 1200 (Wald, J., dissenting) (citing FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940)).
19. *Id.* at 1201 (Wald, J., dissenting).

> one-dimensional notion that members of particular groups may all be expected to program in a uniform, predictable manner: Italians will program Italian opera, Blacks will program soul music; and women will program soft, "feminine" music . . . . To the contrary, an integral part of the far more complex and sophisticated diversity rationale on which the Commission proceeded is the belief that increased participation of minorities and women will help prevent the perpetuation of just such simplistic stereotypical portrayals of minorities and women as those attributed to the Commission by the majority.
>
> . . . .
>
> The point of increasing ownership and participation of underrepresented groups, such as minorities and women, is not to get some specific preordained women's programming or black programming, but to ensure that the varying viewpoints, perspectives and issues of distinct relevance to these groups are fairly represented in the media. . . Women having ownership interests and policymaking roles in the media are likely to enhance the probability that the varying perspectives and viewpoints of women will be fairly represented in the broadcast media.[20]

The majority, however, found the gender preference unconstitutional and remanded *Steele* to the Commission.

Interestingly, the FCC chose not to appeal the *Steele* decision, and there was speculation in the trade press that the "Commission had been content to have the preference killed."[21] Even the Review Board, which created the gender preference, declared shortly after the *Steele* decision that there was confusion as to whether the Commission "any longer support[ed] a female preference."[22]

However, the *Steele* decision was not the last word on gender preferences. The political weight of the issue gathered new momentum. A few weeks after the *Steele* decision was released, its author, Judge Tamm, died. His death played a critical role in the events that followed: In October 1985, in response to a petition by Steele's female competitor and several groups filing *amicus* briefs, the Court of Appeals took the unusual step of vacating the panel opinion and granting rehearing *en banc*.[23]

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20. *Id.* at 1208-09 (Wald, J., dissenting) (citations omitted).

21. *Appeals Court Grants Hearing of Women's Preference in FM Grant*, BROADCASTING, Nov. 11, 1985 at 74 (quoted in Talleyrand Broadcasting, Decision, 103 F.C.C.2d 476, 481 (1985)).

22. *Id.*

23. Steele v. FCC, 770 F.2d 1192 (D.C. Cir.), *vacated en banc* (1985).

In its supplemental brief, the Commission reversed its position on the validity of the gender preference. First, the Commission admitted that it had adopted the gender preference without evidence. Second, the Commission said that it considered both the gender and minority preferences constitutionally suspect. The Commission requested that the court remand *Steele* back to the Commission for reconsideration so that it could conduct a general rulemaking proceeding on the wisdom and constitutionality of its preference policies. Thus, in 1986, eight years after the Review Board began to award gender preferences, the Commission finally sought to build a foundation that might support the policy.

Neither minority nor female preferences enjoyed universal support at the FCC. Commission Chairman Mark Fowler made no secret of his disdain for preferences. For example, in a 1985 speech to the Communications Task Force of the National Conference of Black Lawyers, Fowler argued that preferences were in the "long-term worst" interest of racial equality. "The fact of the matter is today you own less than 2% of radio and television stations. . . . Isn't it time to try something else?"[24]

However, in questioning the constitutionality of minority preferences (which were not at issue in the case) along with gender preferences, the Commission seriously underestimated the potential political fallout. Chairman Fowler apparently assumed the Commission could use *Steele* as a springboard to revisit and eliminate both gender and minority preferences. The Commission's decision to link minority preferences and female preferences in its supplemental brief in *Steele* and the rulemaking that followed had just the opposite effect.

Some forty-five parties filed comments in the rulemaking. Linking gender preferences to minority preferences provoked a great outcry from minority groups, who for the *first* time joined forces with women's groups in an effort to preserve preferred status. Sensing that the FCC might have prejudged the outcome of the rulemaking proceeding, these groups moved the battlefield to Congress and managed an unusual, if not unheard of, twelfth hour amendment to an appropriations measure that forced the

24. *Fowler Tells Minorities Preferences Should Go*, BROADCASTING, Mar. 25, 1985, at 58.

rulemaking to shut down by precluding the FCC from spending any money to complete the rulemaking. Congress also specifically required the FCC to reissue the *Steele* decision consistent with its prior policy.[25] With its hands so tied, the FCC had no choice but once again to affirm its denial of Steele's application.

As a result, two-and-a-half years after the panel's decision, Steele was back to square one in challenging the constitutionality of the gender preference, and so Steele appealed again.

This time, Steele's challenge of the gender preference was consolidated with a case pending in the D.C. Circuit Court of Appeals that challenged minority preferences, *Winter Park*.[26] At the same time, *Shurberg Broadcasting*,[27] challenging the FCC's policy of allowing distress sales to minorities, was proceeding through a separate panel.

In 1988, just before the appellate briefs were to be filed, a white knight appeared to provide a settlement of the *Steele* case.[28] In addition to everything else, Steele was seriously concerned that consolidation with a challenge to minority preferences, which Steele did not oppose, would color the court's treatment of gender preferences and that both preferences might be sustained on appeal to the Supreme Court if Justice Scalia recused himself because of his earlier participation in the *Steele* case. By the time the Court of Appeals heard *Winter Park*, Steele had requested that his case be remanded to the FCC to approve the settlement. Steele's challenge to the gender preference was no longer before the Court of Appeals.

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25. Pub. L. No. 100-202, 101 Stat. 1329-1, 1329-31 - 1329-32 (1987). The Congress has passed identical riders in appropriation bills for the Department of Commerce in each year since. *See* Pub. L. No. 102-395, 106 Stat. 1828, 1846 (1992); Pub. L. No. 102-140, 105 Stat. 782, 797 (1991); Pub. L. No. 101-515, 104 Stat. 2101, 2136-37 (1990); Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989); Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988).

26. Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), *aff'd sub nom.* Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

27. Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989), *rev'd sub nom.* Metro Broadcasting v. FCC, 497 U.S. 547 (1990).

28. The settlement itself turned out to be precedent setting in enabling the white knight to take control of the construction permit. However, it took over two years to gain the Commission's approval. The settlement grant was one of the final acts of the Patrick Commission. James U. Steele, Order, 5 FCC Rcd. 4121 (1990).

IV. *Metro Broadcasting*

In 1989, the D.C. Circuit Court of Appeals reached conflicting outcomes on the constitutionality of FCC programs aimed at increasing minority ownership of broadcast stations. A divided panel in *Winter Park* upheld minority preferences. At nearly the same time, a separate panel deciding *Shurberg* struck down as unconstitutional the Commission's policy allowing distress sales to minorities. The United States Supreme Court agreed to hear consolidated appeals of *Shurberg* and *Winter Park* in *Metro Broadcasting, Inc. v. FCC*.[29]

The Supreme Court that decided *Metro Broadcasting* was in the midst of profound change—change that, according to some observers, would probably mean a different outcome were *Metro Broadcasting* decided today. Justice Brennan, who wrote the opinion, and the late Justice Marshall, who joined in it, have been replaced by successors less sympathetic to affirmative action.

In *Metro Broadcasting*, the Supreme Court upheld both minority preferences and the distress sale policy even though neither was remedial. No one suggested that the FCC had ever discriminated against minority group members in comparative hearings or in approvals of transfers or assignments of licenses. Nor did the Court suggest that there were no racially neutral alternatives to the preferences. Rather, the *Metro Broadcasting* majority found that racial and ethnic preferences were substantially related to an important governmental interest, that of encouraging diversity in broadcast programming. Furthermore, there was a sufficient nexus between minority ownership and program diversity to warrant such "benign" discrimination. Minority preferences, the Court held, do not violate constitutional guarantees of equal protection.

The Court in *Metro Broadcasting* deferred to the expertise of Congress and the Commission. Both the legislature and the agency had determined there was a connection between minority ownership and the diversity of programming; the existence of such a nexus, wrote Justice Brennan, "is corroborated by a host of empirical evidence."[30] Notably, however, the primary exam-

29. 497 U.S. 547 (1990).
30. *Id.* at 580.

ple of empirical evidence cited by the Court in its supporting note was a 1988 Congressional Research Service study, a study conducted ten years after the FCC had adopted its minority preference (and one year after Congress had forbidden the FCC from re-examining the policy). There was disagreement between the majority and the dissenters in *Metro Broadcasting* over the strength of the evidence supporting the FCC's racial and ethnic preferences. In dissent, Justice O'Connor argued that the Commission had made little effort to build a record to support preferences, but had relied instead on "cursory evaluations of what viewpoints the broadcasting spectrum contained."[31] She argued that the FCC "had absolutely no factual basis for the nexus when it adopted the policies and has since established none to support its existence."[32] Former FCC Chairman Fowler, noted Justice O'Connor, had stated as much to Congress:

> To the extent that heightened scrutiny requires certain factual predicates, we discovered notwithstanding our statements in the past regarding the assumed nexus between minority or female ownership and program diversity, a factual predicate has never been established.
>
> For example, the Commission . . . at no time has examined whether there is a nexus between a [broadcaster's] race or gender and program diversity, either on a case-by-case basis or generically. We had no reason to, because the court in *TV 9* told us we could, indeed must, assume such a nexus.[33]

Justice Scalia, who as a member of the Court of Appeals had joined with Judge Tamm in striking down gender preferences in *Steele*, joined with Justice O'Connor in dissenting in

31. *Id.* at 624 (O'Connor, J., dissenting).

32. *Id.* at 627 (O'Connor, J., dissenting).

33. *Minority-Owned Broadcast Stations: Hearing on HR 5373 before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 2d Sess. 16 (1986) (testimony of Mark Fowler, Chairman, FCC) (quoted in *Metro Broadcasting*, 497 U.S. at 628 (O'Connor, J., dissenting)). In 1988, Fowler's successor, FCC Chairman Dennis Patrick, voted against the Commission's support of the minority preference policy when it went before the U.S. Court of Appeals in *Winter Park*. Patrick, referring to *Steele*, explained his dissent by noting the lack of evidence to support the assumption that minority ownership would result in increased programming diversity. As Patrick pointed out, in freezing the FCC's rulemaking on preferences, Congress had prevented the Commission from "making as strong a defense of the constitutionality of its preference scheme as it otherwise might have." *Quello and Dennis Outvote Patrick on Minority Preferences*, BROADCASTING, Sept. 19, 1988, at 96.

Metro Broadcasting. So did Chief Justice Rehnquist and Justice Kennedy.

In deciding *Metro Broadcasting*, the Supreme Court expressly noted that it was not ruling on the constitutionality of the FCC's gender preference, which "is not before us today."[34]

V. *Lamprecht*

While *Metro Broadcasting* worked its way through the federal courts, the case of FCC applicant Jerome Thomas Lamprecht simmered on the back burner. After the ALJ awarded the license to Lamprecht's female competitor, Lamprecht appealed. The Review Board agreed with the ALJ, however, and the Commission refused to review the award. In 1988, Lamprecht took his case to the D.C. Circuit Court of Appeals, which held the case in abeyance until after the Supreme Court's *Metro Broadcasting* decision. Once the Supreme Court in *Metro Broadcasting* expressly declined to rule on the gender preference, the Court of Appeals proceeded to hear Lamprecht's challenge.

As had Steele's attorneys, attorneys for Lamprecht attempted to distance the FCC's gender preference from the minority preference approved by the Supreme Court in *Metro Broadcasting*.

> Nothing has occurred since *Steele* was decided, however, which suggests that the *Metro* decision is any more transferable to the markedly different context of female preferences than were this Court's decisions in *TV 9* and *West Michigan*. To the contrary, subsequent action by Congress, the Commission, and the courts further confirms the irrationality of gender preferences and the validity of distinguishing them from the minority preference upheld in *Metro*. Specifically, *Metro* upheld the preference for ethnic minority owners precisely and only because the link between such ownership and diverse programming was (1) the subject of lengthy fact-finding by both the Commission and Congress, (2) supported by a host of persuasive empirical studies, (3) consistent with the homogenous nature of such excluded groups, and (4) because the preferences were

34. 497 U.S. at 558 n.7. At oral argument, Gregory H. Guillot, the attorney for petitioner Metro, stated that both minority and female preferences were at issue in the case, but admitted that a remand to the FCC would be necessary if only minority preferences were struck down. Justice Scalia emphasized during the oral argument that the Supreme Court should therefore not proceed to consider the constitutionality of the gender preference in *Metro*. 199 Landmark Briefs and Arguments of the Supreme Court: Constitutional Law 671 (1989).

> adopted only after consistent and repeated attempts at increasing minority programming through nonracial alternatives had proven a failure. In contrast, the notion that preferring female owners will increase otherwise underrepresented programming is supported by no fact-finding by the Commission, Congress or the courts, wholly unsupported as an empirical matter, inconsistent with common experience, the Commission's long-standing deregulation policies and general societal evidence, and gratuitously adopted without any consideration of nondiscriminatory alternatives.[35]

In deciding *Lamprecht*, the Court of Appeals took into account the Congressional appropriations riders that mandated FCC gender preferences in the years since the *Steele* decision. The court first noted that it could not decide *Lamprecht* on grounds of lack of statutory authority. Congress, through its appropriations bills, had made a law that not only empowered, but required, the Commission to award preferences to women. The Court of Appeals in *Lamprecht* thus had no choice but to address the constitutional issue of equal protection.

In finding the FCC's gender preference unconstitutional, the Court of Appeals claimed to take support from *Metro Broadcasting*, which, even though ruling that minority preferences *were* constitutional, had "ended debate on several matters."[36] First, *Metro Broadcasting* settled the issue of the standard of scrutiny that the courts should apply to sex-based classifications. Under *Metro Broadcasting*, it was clear that gender-based classifications would not violate the Fifth Amendment if "they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives."[37] The so-called "intermediate" standard of scrutiny would apply. Second, the Supreme Court in *Metro Broadcasting* found that promoting diversity of viewpoints is "an 'important' government objective within the government's power."[38] Therefore, said the majority, the only issue to be determined in *Lamprecht* was "whether the government's methods [were] 'substantially related' to the goal that it hop[ed] to achieve."[39]

That determination, according to the majority, required re-

35. Brief of Appellant Jerome Thomas Lamprecht at 6, Lamprecht v. FCC, 958 F.2d 382 (D.C. Cir. 1992) (No. 88-1395).
36. Lamprecht v. FCC, 958 F.2d 382, 391 (D.C. Cir. 1992).
37. *Id.* (quoting Metro Broadcasting, 497 U.S. at 565)
38. *Id.*
39. *Id.*

view of both "the judgment of law that the policy is constitutional and *the findings of fact that underlie it*."[40] Citing Justice Brandeis, the majority noted that "where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity."[41]

Under prior Supreme Court decisions concerning gender-based classifications, the adoption of gender preferences could not be based on stereotypes and unsupported generalizations about the roles and abilities of men and women. Therefore, under the intermediate scrutiny applied by the *Lamprecht* court, sex-based generalizations must have factual support "strong enough to advance 'substantially' the legitimating government interest."[42]

Even a statistically meaningful correlation between gender and the problem addressed by the gender-based classification might not form a substantial basis for such a classification. The court in *Lamprecht* cited *Craig v. Boren*.[43] That Supreme Court decision struck down an Oklahoma law allowing women, but not men, to buy low alcohol beer at age eighteen. The state could show a meaningful difference in the percentage of arrests of 18 to 20 year-old men and women for drunken driving: 2% as compared to 0.18%. However, the statistically significant difference in arrest rates was not enough to allow the state to discriminate based on gender. As Justice Brennan wrote for the majority: "In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups."[44] Thus, according to the *Lamprecht* majority, "[a]ny 'predictive judgments' concerning group behavior and the differences in behavior among different groups must at the very least be sustained by *meaningful* evidence."[45]

The Court of Appeals identified three implicit assumptions in the FCC's adoption of the gender preference and its endorsement by Congress. It did not consider the first two, for the

40. *Id.* (emphasis added)

41. *Id.* at 392 (citing Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring)).

42. *Id.* at 393.

43. 429 U.S. 190 (1976).

44. *Id.* at 208-09.

45. *Lamprecht*, 958 F.2d at 393 (emphasis added).

Supreme Court, in *Metro Broadcasting*, had already found them to be true. The first assumption is that there is such a thing as "women's programming." The second assumption is that "women's programming" is underrepresented on the airwaves. The court did, however, address the third—that women who own radio or television stations are more likely than white men to broadcast "women's" programming.

In its brief, the Commission "cit[ed] nothing that might support its predictive judgment that women owners will broadcast women's or minority or any other underrepresented type of programming at any different rate than will men."[46] Moreover, the Commission's attorney in oral argument "confirmed repeatedly" that there was nothing in the administrative record to support that presumption. In a footnote, then-Circuit-judge Thomas, writing for the majority, quoted from his questions to the Commission's attorney in oral argument:

> Judge Thomas: . . . how can you conclude that [women] will have a different perspective?
>
> Mr. Pash: Well, I guess this is going to sound circular, but you can conclude they will have a different perspective, because historically, they have been subject to prejudice and different societal attitudes, and this has led to their playing a different role in society, they are being treated differently subject to stereotypes and so forth . . . .
>
> Judge Thomas: But how is this expectation any different from a stereotype, if it doesn't have any basis in fact?
>
> Mr. Pash: Well, I am not saying it does. I am saying it doesn't have any basis in fact. I am saying that this record doesn't provide factual evidence for it . . . .
>
> Judge Thomas: Okay. Fine. But is there any evidence that there is a difference between the stations owned by women and owned by men?
>
> Mr. Pash: No, there is no evidence in the record.
>
> Chief Judge Mikva: You said that three times now . . . .[47]

The majority in *Lamprecht*, having found no factual support for gender preferences in the FCC's record, turned to what it termed the "only study, so far as we know, either inside or outside the legislative record, that actually did examine the possibility: the Congressional Research Service report, Minority Broadcast Station Ownership and Broadcast Programming: Is

46. *Id.* at 395.
47. *Id.* at 395-96 n.5 (citing Transcript of Oral Argument at 33-36).

There a Nexus?"[48] This is the 1988 study chiefly relied on by the Supreme Court in *Metro Broadcasting* to support ethnic and racial preferences.

The *Lamprecht* majority noted the study's methodological flaws, including the failure of the study to define "women's programming." Instead, the study relied on reporting stations' self-characterization of their own programming. However, despite the study's flaws, the court noted that it did give an answer to the question of whether there is a nexus between "women's programming" and female ownership of a station. According to the *Lamprecht* majority, "the answer is . . . 'no.' "[49]

Judge Thomas summarized the CRS study and its comparison of the likelihood of stations owned by women to broadcast "women's programming" and the likelihood of stations owned by members of racial and ethnic minorities to broadcast "minority programming." The study showed:

- About one third (35%) of stations owned primarily by women broadcast women's programming. Slightly less than a third (28%) of stations owned entirely by "non-women" broadcast women's programming.
- "Stations in which women own anywhere from 1% to 50% of the equity are just as likely to broadcast women's programming as are stations owned principally or entirely by women."
- "In five large cities, New York, Los Angeles, Chicago, Dallas and Atlanta, stations with any owners of Black, American Indian, Alaskan, Hispanic, Asian, or Pacific Islander heritage are likelier to broadcast women's programming than are stations with any owners who are women." In contrast, stations owned by women are not much likelier to engage in "minority programming" than are stations owned by men.
- "Of the ten most-used programming formats, nine are as popular in almost precisely the same order for stations owned by 'non-minorities' . . . [men and women included] as they are for stations owned by women."

How do these statistics compare with the CRS findings concerning the nexus between minority ownership and minority programming? Not favorably, said Judge Thomas.

- Stations owned primarily by Indians or Alaskans are eleven times more likely to broadcast Indian or Alaskan programming than are stations owned entirely by non-Indians and non-Alaskans.

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48. *Id.* at 396.
49. *Id.*

- For Asians and Pacific Islanders, the comparable multiplier is eight.
- For Hispanics, it is seven.
- For Blacks, it is almost four.

Thus, women owners are far less likely to broadcast women's programming than are owners of any preferred racial or ethnic minority to broadcast programming directed to their minority counterparts. Stations owned primarily by women are just one and one quarter times as likely to broadcast women's programming as are stations owned entirely by men.[50]

According to the majority in *Lamprecht*, the only study submitted in support of female preferences did not "establish any statistically meaningful link between ownership by women and programming of any particular kind."[51] The FCC's gender preference did not measure up to the requirements of intermediate scrutiny and therefore violated the Fifth Amendment rights of men to equal protection of the law.

Chief Judge Mikva, in a lengthy dissent, questioned whether the majority in *Lamprecht* had reached a conclusion consistent with the Supreme Court's *Metro Broadcasting* decision. First, he suggested that the majority improperly second-guessed Congress in interpreting the CRS study. The proper test is not whether the court agrees with the conclusions drawn by Congress, but whether there existed in the record evidence that Congress might have used to support a gender-based classification. Furthermore, according to Mikva, there is no requirement that the Commission or the Congress have any statistical basis for support, but only that "reasoned analysis" led to adoption of the gender-based classification.

> Neither *Metro* . . . nor *Craig* . . . say what my colleagues say they say: that courts can overturn congressionally mandated gender classifications whenever they are not convinced by the statistical evidence before Congress. On the contrary, *Metro*, following a long line of gender cases, says that the purpose of intermediate scrutiny is to ensure that Congress's judgements are based on reasoned analysis rather than archaic stereotypes.[52]

Judge Mikva seemed particularly concerned that the majority failed to note the difference, as he saw it, between archaic or

50. *Id*. at 397.
51. *Id*. at 398.
52. *Id*. at 408 (Mikva, J., dissenting).

"offensive stereotyping" and the "benign" discrimination the Supreme Court approved in *Metro Broadcasting* and that Mikva in his dissent characterized as a "mild gender preference."[53]

Judge Mikva further took issue with the majority on the meaning of the statistical evidence. He did not agree that the relationship between female ownership and women's programming is not supported by the CRS Report, and noted that the cover page of the CRS report states that "there is a strong indication that minority and women station ownership result in a greater degree of minority programming." He also argued that the percentage difference between women's programming on female and male owned stations *is* substantial, even though smaller than some of the other correlations noted by the study between minority ownership and programming.[54] Finally, Judge Mikva took issue with his colleagues for failing to note what he saw as ample evidence of the ownership-programming nexus gleaned from a "quick skim of the best-seller lists, the computer banks, and the rejected amicus brief . . . ."[55]

VI. The Agency-Court Partnership

The disagreement between Judge Mikva and the *Lamprecht* majority over what is "substantial" evidence raises interesting questions about the current and future state of the "agency-court partnership"[56] and the role of Congress in the relationship. Of

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53. *Id.* at 410 (Mikva, J., dissenting).

54. *Id.* at 412-13 (Mikva, J., dissenting) (emphasis omitted).

55. *Id.* at 415 (Mikva, J., dissenting). One group seeking to file an amicus brief in *Lamprecht*, American Women in Radio and Television, was not allowed to submit its brief late.

56. Given the FCC's history before the courts, *Lamprecht* was the exception, rather than the rule. Over the years, the Commission has won far more appeals of its actions than it has lost. Statistics developed by the FCC's General Counsel in 1989, for example, show that over the last two decades, the Commission's win-loss record on appeal has been about 73%-27% (and losses include both outright reversals and decisions that the courts vacated and remanded to the Commission for any reason). *Commission v. Courts*, BROADCASTING, May 8, 1989, at 92-93.

Former FCC Commissioner Glen O. Robinson, now a law professor at the University of Virginia, agrees with the FCC's statistics, saying his own study showed the Commission's success rate before the federal courts from 1970-76 was about 73%. Professor Robinson, echoing the late Circuit Judge Harold Levanthal, describes the relationship as an "agency-court partnership." *Id.*

In the 1980s, according to some observers, the "agency-court partnership" instead became a triangle. Congress has taken an increasingly active part in oversight of particular interest, and not clearly addressed in either the *Lamprecht* majority opinion or the dissent, are the issues of *who* must establish statistical or other evidence supporting a rule or law and *when* such a record must be established.

The "substantial evidence" test[57] traditionally applied when

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FCC rulemaking. During the deregulatory 1980s, members of Congress had expressed their unhappiness with much of what the FCC and the courts did in the area of communications policy through contrary legislation. That was certainly the case with gender preferences, where a court challenge had led the FCC to reexamine their earlier adoption. Congressional reaction, in the form of appropriations restrictions, made the decision-making process used by Congress, as well as the FCC, an issue in *Lamprecht*.

57. Sympathetic federal courts recognize the complex technological and economic developments that led to the creation of federal regulatory agencies. Traditionally, they have gone to some lengths to affirm agency decisions. The courts have construed the scope of agency authority generously, measuring "the range of administrative power in terms of the needs of the legislative policy." Frederick B. Davis, *Administrative Law: Today and Tomorrow*, 22 J. PUB. L. 335, 352 (1973).

The terms of the Communications Act of 1934, which created the Federal Communications Commission, imply a broad authority. "Public interest, convenience and necessity" is a broad mandate and has been broadly defined. Added to the FCC's broad authority is the great deference the courts have given to the expertise of this and other regulatory agencies.

Judicial deference to agency findings has evolved into the substantial evidence rule. Applying this rule, the courts have upheld regulatory decisions as long as the record contains such evidence "as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (quoted in Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)).

Courts reviewing agency decisions and rulemaking have thus theoretically refrained from making independent judgments on the weight of evidence and concerned themselves only with questions of law, including the issue of whether the agency decision was "wholly unsupported by evidence or clearly arbitrary." Ma-King Products Co. v. Blair, 271 U.S. 479, 483 (1926).

According to its critics, the substantial evidence rule has led to judicial rubber stamping of many agency decisions. *See, e.g.*, GLEN O. ROBINSON & ERNEST GELLHORN, THE ADMINISTRATIVE PROCESS 751 (1974); Lewis J. Paper, *Judicial Scrutiny of the FCC: The Illusion of Usurpation*, 52 B.U. L. REV. 659, 667-70 (1972). At the very least, it has meant that "substantial," as a measure of the facts necessary to support agency decisions, is something less than its dictionary synonym "considerable." "Substantial" has been defined as "more than a mere scintilla," Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), but it need not be a preponderance of the evidence such as might preclude a contrary conclusion. *See, e.g.*, NLRB v. Fant Milling Co., 360 U.S. 301, 309 n.10 (1959).

However broad its authority, no federal agency may make decisions without establishing a record to support them. The Administrative Procedure Act prohibits administrative agencies from taking action that reviewing courts find to be arbitrary, capricious or an abuse of discretion. 5 U.S.C. § 706 (2)(a) (1988). To the extent that they must allow interested parties the opportunity to participate in the proceedings leading to the adoption of rules, federal agencies must also base their rulemaking on the federal courts have reviewed actions by regulatory agencies seems to presuppose that evidence—convincing or ambiguous—is to be mustered by the agency *prior* to its adoption of a rule or policy. In the case of the FCC's female preference, the agency itself has repeatedly admitted what its critics have charged: Absolutely no record of any kind was established before the gender preference was created.

Therefore, the test of "substantiality" that the majority seems to apply in *Lamprecht* is based on the court's willingness to go along with the novel administrative law theory that an agency may adopt a rule without the benefit of a factual record and that the courts may affirm that rule if anyone, at any time, comes up with facts that might support what the agency has already decided. While the court in *Lamprecht* found the FCC gender preference unconstitutional, it was not because the FCC had adopted the policy without building a foundation. Nor was it because Congress, in mandating a return to that policy, had likewise acted on no record. It was because the court, after its own examination of evidence submitted to support the policy *after the fact*, found that evidence unconvincing.

In that respect, the *Lamprecht* court seems to apply a test at the same time more and less demanding than the litmus test traditionally applied to agency decisions. Previous decisions seemed to accept the FCC's factual determinations, no matter how unpersuasive or ambiguous the facts might have seemed. The *Lamprecht* court took on an important role in evaluating the evidence. Yet it tacitly agreed that evidence outside the agency's record could be used after the fact to support an agency decision. For whatever the meaning of the CRS study, it was conducted years after the FCC had begun to award gender preferences and after Congress had forbidden the FCC from re-examining that decision.

Judge Mikva would go even further. Not content to limit the court's examination to the evidence submitted by the parties on appeal, Judge Mikva suggested that the majority had been "less than sporting"[58] in failing to solicit submissions that might support the gender preference. Judge Mikva seemed to accept

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more than a hunch. Rules adopted without any investigation of facts are vulnerable to challenge by disgruntled parties left out of the loop.

58. *Lamprecht*, 958 F.2d at 414 (Mikva, J., dissenting).

the idea that members of the court might base their decision on their independent review of whatever facts might exist anywhere, from the best-seller list to computer data banks. Not only could the parties submit evidence that the agency had never considered, but the court could rely on evidence outside the record on appeal itself.

As Judge Mikva pointed out, the Supreme Court in *Metro Broadcasting*, by discussing studies submitted in amicus briefs to support the constitutionality of minority preferences, seemed to have set the stage for the appeals court in *Lamprecht*. While the Supreme Court in *Metro Broadcasting* did not go so far as to develop its own record from the "best-seller list," it certainly did not restrict itself to evidence in the record limited to the period before the Commission or the Congress embraced minority preferences. The "host of empirical evidence" that the *Metro Broadcasting* majority cited to support its findings was developed years after the FCC first began to award minority preferences. The studies the Supreme Court relied on in its analysis of the Commission's minority preferences included the 1988 CRS study, a 1990 study done at the California Institute of Technology, two 1986 studies (one for Howard University's Annual Communications Conference and another for the NAB) and one 1981 study done by a researcher at the University of Wisconsin.[59]

Had Congress not intervened in the issue of preferences, it is hard to see how the courts could have used such studies to give factual support to policies adopted in the 1970s. Yet there is little evidence that Congress, before it adopted its appropriations riders, acted to establish its own record in support of the policies it forbade the FCC from re-examining.

After *Lamprecht*, it is difficult to assess what kind of record is needed to support this kind of agency/Congressional policy making, either in terms of process or content. While Judge Mikva in his dissent raises valid questions about the court's decision to weigh the evidence on its own, his own version of what the proper test might have been raises troubling procedural issues itself.

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59. Metro Broadcasting, Inc. v. FCC, 495 U.S. 547, 580-81 nn.31-32 (1990).

VII. Judicial Politics

As much as any other issue that has come before the federal courts, the equal protection issues raised in the challenges to the FCC's minority and gender preferences have demonstrated the politics of the judicial branch, as well as the legislature. Judge Mikva's dissent in *Lamprecht* is but one example.

Speculation is that the *Lamprecht* opinion was not released earlier because its author, Clarence Thomas, had been nominated to the Supreme Court. He sat on the panel as a Circuit Judge when the case was argued in January 1991. Although the D.C. Circuit typically decides cases in less than two months, the *Lamprecht* decision was not handed down for over a year.[60] In the interim, Justice Thomas was confirmed by the Senate.

Justice Thomas' nomination to the United States Supreme Court was threatened by allegations that he had sexually harassed Anita Hill, a female assistant, while he was head of the Equal Employment Opportunity Commission. However, even before the eleventh-hour Thomas-Hill drama riveted television viewers, some women's rights activists opposed the nomination. Judge Thomas had been an outspoken critic of affirmative action. Many feminists suspected he would vote with an increasingly conservative Court to overturn *Roe v. Wade*[61] when the abortion issue inevitably came again before the Supreme Court. Thus, it would not have been surprising, said some political observers, that Thomas' opinion in *Lamprecht* was not released until he made it safely through the Senate confirmation hearings. The *Lamprecht* opinion, after all, held unconstitutional a regulatory policy that many Senate Democrats, feminists and minority groups supported. Ironically, perhaps, *Metro Broadcasting* was Justice Brennan's last opinion for a Supreme Court that was becoming increasingly conservative on affirmative action. *Lamprecht* was Judge Thomas' last opinion for the Court of Appeals before he replaced Brennan's colleague, Justice Marshall, who

60. Garry Sturgess, *Senate Mulls Thomas' Controversial Case; Draft Opinion Would Overturn FCC Ruling on Gender Preferences*, Legal Times, Sept. 30, 1991, at 1, 22. The Legal Times gave details about the *Lamprecht* decision that, according to Judge Buckley's concurring opinion in *Lamprecht*, could only have been based on a court clerk's leak of the preliminary drafts. *Lamprecht*, 958 F.2d at 403 (Buckley, J., concurring).

61. 410 U.S. 113 (1972).

had joined in the *Metro Broadcasting* majority. With the political shift represented by Thomas' replacing Marshall on the Supreme Court, and the continued presence of the four dissenters in *Metro Broadcasting*, the vote on the issue of minority preferences might well be different if the issue came before the Court today.

VIII. The Gender Preference After *Lamprecht*

Lamprecht offers little guidance about what evidence might support the adoption of a preference for women in comparative hearings. The majority found that the evidence submitted to it was not substantial enough to justify a gender-based classification, but it did not rule out the adoption of a preference for women should the Commission support its policy with more convincing evidence.

Various women's organizations have called for the FCC to find a way to restore the female preference. Women in Communications, Inc. (WICI), for example, urged its members to help gather the documentation that would establish a foundation for the policy, criticizing *Lamprecht* as a regression to "prior practices when discrimination ran rampant."[62] WICI joined with seven other women's rights organizations in filing comments in support of restoring the female preference in the FCC's current reexamination of the Policy Statement on Comparative Hearings.[63]

One of the reasons the FCC has chosen to conduct its first comprehensive review of the comparative licensing process, however, may also be one of the major arguments against restoring a preference for women. Comparative criteria have been the subject of continuing criticism. In its 1992 Notice of Proposed Rulemaking, the Commission noted that experience with com-

62. Conda Lenox Blackmon, *Women's Broadcast Licensing Affected*, THE PROFESSIONAL COMMUNICATOR, Summer 1992, at 26-27. It should be noted that despite the claim by WICI's President Michele Y. Edwards that "discrimination ran rampant" under prior policies, there has never been any evidence that the gender preference or the minority preference was remedial or that the FCC in any way discriminated against minorities or women in awarding licenses prior to adopting the preferences.

63. Reexamination of the Policy Statement on Comparative Hearings, Notice of Proposed Rule Making, 7 FCC Rcd. 2664 (1992).

parative proceedings has left in doubt the fairness and effectiveness of the process in protecting the public interest.

The Commission noted that too often comparative hearings are long and costly. The *Lamprecht* and *Steele* cases are but two examples of the time and money applicants and the Commission expend on deciding between competitors. These proceedings often result in decisions based on slight distinctions among applicants. More importantly, the comparative process, suggest many critics, is easily manipulated by applicants and their lawyers.

The FCC has noted the opportunities for manipulation of the hearing process using both minority and gender preferences. Because the Commission does not take into account "passive" owners in determining integration credit, it is possible for an applicant largely owned by white males to claim that its only "active" principal is a woman or minority group member. These "questionable two-tiered applicants," under the Commission's so-called Anax Doctrine,[64] receive dispositive comparative credit for what critics claim are nothing more than "fronts" who exercise little real power, have little investment at risk, minor, if any, equity in the applicant, and questionable expertise or long-term commitment to the enterprise.

Among the questions raised by James Steele, for example, was whether he was actually competing against a woman or against her family. Throughout her testimony in the hearing, Steele's female opponent used the term "we" in discussing her application and later acknowledged that "we" included her husband. Steele's attorneys alleged that this was "a peculiar usage for an applicant claiming 'diversity of expression' credit for 100% female ownership as a sole proprietorship," and that, given all the circumstances, Steele's opponent was "a poorly disguised female 'front' for her husband or for her father, neither of whom successfully could have pursued the St. Simons Island application as a disclosed principal."[65] Neither the ALJ nor the Review Board agreed to add a real-party-in-interest issue on the basis of a family relationship alone. However, the Review Board

64. Anax Broadcasting, Inc., Memorandum Opinion and Order, 87 F.C.C.2d 483 (1961), *limited* Milt Klein, Memorandum and Order, 3 FCC Rcd. 956 (1988).

65. Brief for Appellant James U. Steele on Rehearing en Banc at 8, Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985) (No. 84-1176).

did "caution [Steele's opponent's] family that their broadcast entrepreneurial endeavors [were] operating at the outer limits of what [was] permissible . . . ."[66]

Like Steele, Jerome Lamprecht, a male applicant with substantial work experience in broadcasting, was defeated by a woman who had never worked in broadcasting. Lamprecht's female opponent was the wife of a Washington communications attorney and the mother-in-law of the communications attorney who represented her. She, like Steele's female opponent, had enjoyed several ownership interests in media as a result of family connections. As early as 1969, she had purchased an interest in a television company represented by her husband. In the mid-1970s, her husband had given her his ownership interest in a radio station applicant. Her husband and son-in-law had also been applicants for various broadcast licenses.[67]

Neither woman appeared to be a broadcast pioneer, blazing trails through a hostile male establishment as she battled her way to the top of the industry. On the contrary, both had family members who were involved in broadcasting and who had savvy about FCC policies and procedures. It should be emphasized that neither applicant was found to have acted illegally or improperly, nor is there anything wrong in applicants taking advantage of legitimate government policies. And by no means can it be said that most female-controlled applicants are not legitimately formed. But where its very policies themselves create an opportunity for abuse, the Commission is obliged to be extra vigilant, especially where such policies may encourage and reward manipulation by the established white males the preference seeks to displace.[68]

Recently, the FCC has taken steps to reform its application process and hearing procedures to limit sham applications and protect the interests of all legitimate applicants. However, if the FCC's goal is programming diversity, there are direct means of

66. *Id.* at 8-9 (citing Cannon's Point Broadcasting Company, Decision, 93 F.C.C.2d 643, 656 (1983)).

67. Lamprecht v. FCC, 958 F.2d 382, 387 (D.C. Cir. 1992).

68. Not long after it adopted female preferences, the FCC did away with its anti-trafficking rules. So it is possible for a woman who has no intention of operating a station to win a license because of her gender and then sell that valuable property to the same male who could not successfully have competed against her in a comparative hearing.

achieving that goal within the FCC's power. The comparative hearing offers ample opportunities for the Commission to make judgments about program diversity based on programming proposals. There is no need in the context of a comparative hearing to adopt constitutionally suspect gender classifications that are aimed indirectly at affecting programming. The Commission has the authority to extract programming promises from applicants and to hold applicants to their promises. It could even condition sales of construction permits or licenses on buyers' fulfilling programming promises, so that the goal of programming diversity would continue to be served even if the identity of the owner changed. If the Commission is hesitant (as it should be) to involve itself in program content in a direct manner, the question must be asked why it should do so indirectly in an ineffective way.

IX. *Steele* and *Lamprecht*: A Postscript

Neither the Commission nor the Intervenor appealed the *Lamprecht* decision to the Supreme Court. So unless it is resurrected in the FCC's rulemaking on comparative hearings, the gender preference is dead. After ten years and considerable cost, the battle over equal protection waged first by James Steele and then by Jerome Lamprecht is over.

But the final irony in this history of ironic and bitter twists is that neither protagonist won the war. The station for which Steele applied, and which ultimately went on the air under the control of a third party after he and his female opponent settled, is now in receivership.

As for Jerome Thomas Lamprecht, the FCC reconsidered his application according to the court's remand order—that is to say, "without considering the gender credit previously awarded [his opponent]."[69] In October 1992, the Commission once again awarded the construction permit to the female applicant. This time the Commission based the award on her local residence and community activities, which it said outweighed Lamprecht's past broadcast experience.

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69. Jerome Thomas Lamprecht, Memorandum Opinion and Order, 7 FCC Rcd. 6794, 6795 (1992).

The Impact of Land Use Regulation on Cellular Communications: Is Federal Preemption Warranted?

Jaymes D. Littlejohn

I. INTRODUCTION

There can be no doubt that cellular telephone use has become widespread.[1] In metropolitan areas like the twin cities of Minneapolis and St. Paul, Minnesota, antennas and transmitters create cells with radiuses of one to eight miles[2] and facilitate thousands of simultaneous calls.[3] As increasing numbers of users subscribe to cellular systems,[4] more cells must be created by installing more antennas and transmitters.[5]

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1. *See, e.g.*, John J. Keller et al., *Hello Anywhere: The Cellular Phone Boom Will Change The Way You Live*, BUS. WK., Sept. 21, 1987, at 84.

2. V. H. MacDonald, *The Cellular Concept*, 58 BELL SYS. TECH. J. 15, 30 (1979).

3. Lad Kuzela, *Mobile Phones: Perks No More*, INDUS. WK., Oct. 13, 1986, at 46.

4. In the twin cities of Minneapolis and St. Paul, Minnesota users have a choice of US West Cellular or Cellular One for cellular telephone service.

5. Dick Dahl, *Cellular Phones: What They Are, How They Work, and How the People at New Vector and MCI Cellcom are Marketing Them in the Twin Cities*, CORP. REP., May 1985, at 63. The cellular system has been summarized as follows:

A recent article in Minneapolis' *Star Tribune* described the need for these cellular antenna installations as follows:

> US West and Cellular One, the two companies given licenses by the federal government to build cellular phone systems in the Twin Cities, are racing to buy space on water towers, parking ramps and even along the sidelines of a high school football field to put up antennas. Many of them, such as the nearly 300-foot free-standing tower on Gladys Schlosser's farm in Medina and the half-dozen small antennas being negotiated for the roof of the St. Paul Civic Center, are creating little fuss. Others, such as the 150-foot tower proposed near homes in Orono, has led to a building moratorium as city officials try to sort out the implications of the new technology, which is not covered by its zoning laws.[6]

Development of this relatively new technology has, in many instances, outpaced the ability of communities to enact zoning ordinances to accommodate cellular services.

Rather than requiring a high-powered single transmitter site at a high elevation, cellular telephones use low power and multiple transmitters.[7] These transmitter sites, also called "cell sites," are distributed throughout the area to be provided with cellular service.[8] As the system continues to expand, both in capacity and in geographical coverage, the increasing need for antennas will unavoidably conflict with land-use planning and zoning laws. The American Planning Association's newsletter recently noted as follows:

> They [cellular telephones] have become so widely used that nearly 600 cellular communications networks have been established nationwide, a dramatic increase over the 32 systems in place only 6

> According to the cellular concept, a desired service area is divided into regions called cells, each with its own land radio equipment for transmission to and from mobile units within the cell. It was further recognized that if the available channels were distributed among smaller cells the traffic capacity would be greater. Thus a system needing a relatively small capacity could use large cells, and, as necessary to achieve larger capacity, these cells could be divided into smaller ones. Each channel frequency can then be used for many independent conversations in many cells which are spaced far enough from each other to avoid undue interference.

W.R. Young, *Advanced Mobile Phone Service: Introduction, Background, and Objectives*, 58 BELL SYS. TECH. J. 1, 7-8 (1979).

6. Mike Kaszuba, *Cities, Suburbs Bristling With-and Over-Antennas*, MINNEAPOLIS STAR TRIBUNE, Nov. 19, 1990, at 1A, 11A. This duopoly in which two cellular carriers provide service to each geographic area creates the need for twice as many cell sites, thus increasing the potential for the problems analyzed in this article.

7. MacDonald, *supra* note 2, at 16.

8. *Id.*

> years ago. Some inside the industry expect that within 10 years one-fifth of all telephone communications will be transmitted via cellular units. As the devices become more popular, the antennas that broadcast their transmissions are becoming common features on the landscape of America's cities and suburbs. And, like any new land use, these antennas present problems that must be addressed in local zoning codes.[9]

Unfortunately, cellular service providers are often faced with zoning ordinances which address the demand for new antennas by prohibiting, or severely limiting, the construction of cell sites.

A. Design of Cellular Systems

Zoning considerations have played a part in cellular system design since the first developmental test in Chicago in 1978.[10] That early system employed only ten cells to cover 2,100 square miles and to provide coverage to just 2,000 mobile users.[11] Developers used antennas varying from 150 to 550 feet to accomplish this geographic coverage.[12]

Only three of the ten cell sites required the construction of towers in that first system.[13] To avoid potential delays caused by zoning problems and to cut capital investment costs, developers used existing buildings and other structures.[14]

Consistent with the aims of local planning officials seeking to minimize the impact of antenna installations in their communities, cellular providers currently want to build as few antennas as possible. The motivation for cellular providers in system design, however, is largely economic;[15] a cellular antenna site is expensive to build.[16] As a result, it is in the best financial interest of the provider to build as few sites as possible to provide adequate service to cellular subscribers. This is accomplished by designing the system based on theoretical cells which are hexag-

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9. *Siting Cellular Transmitters*, ZONING NEWS, Jan. 1991, at 1.

10. D. L. Huff, *Advanced Mobile Phone Service: The Developmental System*, 58 BELL SYS. TECH. J. 249, 251 (1979).

11. *Id.* at 251-53.

12. *Id.* at 252.

13. *Id.* at 251.

14. *Id.*

15. MacDonald, *supra* note 2, at 20-22.

16. *Id.* at 24-25.

onally shaped.[17]

In principle, cellular antenna sites need not be regularly spaced, nor do their corresponding cells have to be any particular shape.[18] To provide the service required and still keep the number of antenna sites to a minimum, however, cellular designers choose proposed locations based upon this hexagonal geometry.

Positioning the antenna sites to create this regular pattern is indeed "one of the most difficult practical hurdles in engineering and installing cellular systems."[19] Physical tests of the prototype system reveal that antenna sites can be located a distance of no more than one-fourth of the cell radius from the ideal location at the center of the cell.[20] When a system is in the earliest stages of development and the cells are comparatively large, designers have more flexibility with cell site selection. In a mature system with cells one mile in radius, however, this translates into only 1320 feet, or about four city blocks.

Because cellular providers do not have the power of eminent domain in many states,[21] the choice of antenna site locations is further limited to property which has landowners willing to sell or lease space for the use. Therefore, by the time planners request local zoning approval for an antenna site,[22] the site may be the only available location. If a particular antenna site is prohibited by a zoning law, that law directly conflicts with the federal aims of promoting cellular development.

B. Cellular's Preemption Analysis

This Essay analyzes whether federal law should preempt local zoning regulation of cellular antenna installations. The absence of reported cases in this area may be attributed to the relative infancy of the cellular industry.[23] Although cellular

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17. *Id.* at 20.

18. *Id.* at 16.

19. *Id.* at 27.

20. *Id.*

21. MINN. STAT. ANN. § 300.04 (Supp. 1992).

22. In most instances the zoning authorities require providers to seek some form of approval, ranging from administrative review to requiring a conditional use permit. *Siting Cellular Transmitters*, *supra* note 9, at 1-2.

23. John W. Berresford, *The Impact of Law and Regulation on Technology: The Case History of Cellular Radio*, 44 BUS. LAW. 721, 723-31 (1989).

communication theory dates back to sometime before 1947,[24] cellular systems were not available to the general public until late 1982.[25]

A court of law is the final arbiter of constitutional questions[26] such as whether federal law preempts local law.[27] This doctrine of federal preemption is based upon the Supremacy Clause of the United States Constitution.[28] As a general rule, federal law will not preempt local law when the activity regulated by the local government is of dominant local importance and only remotely related to federal interests.[29] In the case of cellular communications, however, the overriding federal interest in promoting readily available, reliable cellular service to the entire nation suggests that federal law should preempt local zoning regulations.

The analysis of each zoning ordinance usually is determined based upon the particular facts of a given case.[30] The Supreme Court has noted that "[n]o simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply."[31] Critics have attacked this approach to preemption analysis because of its lack of predictability.[32] Local zoning authorities and cellular providers, however, must attempt to understand—if not predict—when a particular ordinance will be preempted. Rather than formulate

24. Young, *supra* note 5, at 6. "The *cellular* concept and the realization that small cells with spectrum re-use could increase traffic capacity substantially seem to have materialized from nowhere, although both were verbalized in 1947 by D. H. Ring of Bell Laboratories in unpublished work." *Id.* at 7.

25. Berresford, *supra* note 23, at 727.

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

27. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

28. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . 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." U.S. CONST. art. VI.

29. *See* Pikop v. Burlington N. R.R., 390 N.W.2d 743, 755 (Minn. Ct. App. 1986), *cert. denied*, 480 U.S. 951 (1987).

30. *See, e.g.*, Connor v. Township of Chanhassen, 81 N.W.2d 789, 798 (Minn. 1957).

31. Goldstein v. California, 412 U.S. 546, 561 (1973).

32. *See* Russell Chapin, *Harmonizing Federal Preemption Doctrine with Garcia's Cession of State and Local Interests to the Political Process*, 23 URB. LAW. 45 (1991).

a general preemption rule,[33] therefore, this Essay explores the factors to be considered by the courts in deciding whether the FCC creation and regulation of the nationwide cellular communication network should preempt local zoning regulation.

II. THE BASES FOR FEDERAL PREEMPTION

The Minnesota Supreme Court examined the question of federal preemption in the case of *Pikop v. Burlington Northern Railroad*.[34] After an exhaustive analysis of the various bases for federal preemption, the *Pikop* court summarized the following instances in which federal law will preempt state law:

> The first arises when Congress explicitly states that the federal scheme preempts any state action in the field. This instance however, is rare, for Congress seldom expressly precludes all state law in a given regulatory field. The second case, in which Congress implicitly preempts state law, is somewhat more common. In such a case, preemption is inferred from either the extent of the federal involvement or the scope of the federal interest. Even where Congress has not, either explicitly or implicitly, displaced all state action in a specified field, the preemption doctrine will invalidate any state law that in fact, conflicts with the federal law. This third case arises when compliance with both the federal and state law is a physical impossibility or when the state law is an obstacle to the accomplishment of the purposes of the federal scheme.[35]

This Essay will examine each of these instances of preemption. No distinction between federal statutes and regulations is necessary in view of the Supreme Court's unequivocal rule that

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33. Just such a general rule in favor of preemption has been touted by those in the cellular industry since practical cellular services were first made available to the public in 1983. *See* Philip Palmer McGuigan et al., *Cellular Mobile Radio Telecommunications: Regulating an Emerging Industry*, 1983 B.Y.U. L. REV. 305. This rule is based upon the following expressed intent of the FCC:

> Commission members want to ensure that anyone with a cellular mobile telephone in his or her car or briefcase will be able to place and receive calls in any city with a cellular system. The Commission asserts that nationwide compatibility of cellular systems would also result in lower user cost because of the mass production of cellular equipment which would be a likely consequence of compatibility. Conflicting state regulations could frustrate this policy of nationwide compatibility; therefore, in the FCC's estimation, a good deal of federal preemption is justified.

Id. at 318 (citing An Inquiry Into the Use of the Bands 825-845 Mhz and 870-890 Mhz for Cellular Communications Systems, Notice of Inquiry and Proposed Rule Making, 78 F.C.C.2d 984, 997-99 (1980)).

34. 390 N.W.2d 743 (Minn. Ct. App. 1986).

35. *Id.* at 748 (citations omitted).

"[f]ederal regulations have no less preemptive effect than federal statutes."[36]

A. Explicit Federal Preemption

Where the FCC has expressly preempted state regulation, it has stated simply that state and local regulations are preempted in a particular area.[37] Because local governments derive their power only from the state legislature,[38] FCC regulations also will preempt local zoning laws.[39] In the genesis of cellular regulation, the FCC stated that it was "asserting federal primacy over the areas of technical standards and competitive market structure for cellular service."[40] This level of explicit federal preemption appears to be beyond challenge.[41] The FCC also has decided that cellular service serves a national need and has determined which parties will be allowed to fill that need.[42] Since the FCC has not yet expressly preempted zoning laws that prevent cellular providers from supplying the nationally needed cellular communications service, any thorough analysis of this issue must focus upon whether the FCC may do so.[43]

In order for the FCC explicitly to preempt zoning regulations, it must meet the unavoidable challenge that such a preemption order is beyond the FCC's jurisdiction.[44] On its face, the Federal Communications Act appears to support this challenge.[45] The Act denies jurisdiction to the FCC over "facilities,

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36. Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (quoted in Capital Cities, Inc. v. Crisp, 467 U.S. 691, 699 (1984)). *See also* Hillsbourgh County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713-20 (1985); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-47 (1963).

37. *See, e.g.*, City of New York v. FCC, 486 U.S. 57 (1988). The Supreme Court held that "in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area." *Id.* at 64.

38. Costley v. Caromin House, Inc., 313 N.W.2d 21, 27 (Minn. 1981).

39. 3 A. RATHKOPF & D. RATHKOPF, THE LAWS OF ZONING AND PLANNING, § 31.05 (rev. perm. ed. 1990).

40. Use of Certain Frequency Bands for Cellular Communications Systems, Final Rule, 46 Fed. Reg. 27,655, 27,669 (1981).

41. McGuigan, *supra* note 33, at 342-25.

42. Public Mobile Radio Services, Final Rule, 47 Fed. Reg. 10,018, 10,033 (1982).

43. *See* McGuigan, *supra* note 33, at 322-30.

44. *See, e.g.*, California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986).

45. Section 2(b) of the Federal Communications Act is codified at 47 U.S.C. § 152(b) and provides as follows:

> Except as provided in section 224 of this title and subject to the provisions of

or regulations for or in connection with intrastate communication service by wire or radio of any carrier."[46] The Act's jurisdictional limitation applies to facilities of "wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof."[47]

In *Puerto Rico Telephone Company v. FCC*, the First Circuit Court of Appeals recognized that "[r]ead literally, these provisions do appear to preclude the federal jurisdiction extended elsewhere in the Act,"[48] but the court clarified that "these sections sweep far less broadly than their language would indicate."[49] In *Puerto Rico Telephone*, the Commonwealth of Puerto Rico established the Puerto Rico Telephone Authority to acquire and operate all telephone and telegraph communications systems in Puerto Rico.[50] After the Authority purchased the

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> section 301 of this title, . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 152(b) (1988). Section 221(b) of the Act is codified at 47 U.S.C. § 221(b) and provides as follows:

> Subject to the provisions of section 301 of this title, nothing in this chapter shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a State commission or by local governmental authority.

47 U.S.C. § 221(b) (1988).

46. 47 U.S.C. § 152(b) (1988).
47. 47 U.S.C. § 221(b) (1988).
48. 553 F.2d 694, 698 (1st Cir. 1977).
49. *Id.* at 698.
50. *Id.* at 696.

Puerto Rico Telephone Company (PRTC), it refused to connect privately supplied branch exchange (PBX)[51] equipment to the PRTC telephone system in direct violation of FCC tariffs.[52] Examining the language and history of the Federal Communications Act, the court determined that the FCC could indeed prohibit the PBX rule, regardless of the rule's apparently intrastate application.[53]

The court first analyzed the "unequivocal" legislative history of section 221(b) of the Act.[54] That section's references to intrastate facilities were "intended to exempt from FCC regulations 'exchange services in metropolitan areas overlapping State lines.' "[55] In other words, section 221(b) simply provides for the same degree of federal and state regulation that section 2(b) provides for metropolitan exchanges that exist entirely within a single state's boundaries.[56]

Relying upon the Supreme Court's earlier decision in *Ambassador, Inc. v. United States*,[57] the First Circuit recognized that the FCC's jurisdiction "extends to 'interstate wire communication from its inception to its completion.' "[58] As a result, the FCC was held to have jurisdiction to determine whether the PRTC could dictate the terms on which PBX owners could obtain and use their equipment.[59] As a result, the court acknowledged that the FCC may not have jurisdiction over facilities that

51. PBX equipment includes intra-office and intra-hotel telephone systems with a privately owned switchboard which links the PBX owner's telephone system to the outside world. *Id.* at 696.

52. *Id.* at 696.

53. *Id.* at 697-700.

54. *Id.* at 698.

55. *Id.* (quoting S. REP. NO. 781, 73d Cong., 2d Sess. 5 (1934)).

56. *Puerto Rico Tel. Co.*, 553 F.2d at 699.

57. 325 U.S. 317 (1945).

58. *Puerto Rico Tel. Co.*, 553 F.2d at 699, (*quoting* United States v. AT&T, 57 F.Supp 451, 454-55 (S.D.N.Y. 1944), *aff'd mem. sub nom.* Hotel Astor v. United States, 325 U.S. 837 (1945)). As later noted by the District of Columbia Circuit Court of Appeals, "[e]very court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used." National Association of Regulatory Utility Commissioners v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984), (*citing* United States v. Southwestern Cable Co., 392 U.S. 157, 168-69 (1968); New York Telephone Co. v. FCC, 631 F.2d 1059, 1065-66 (2d Cir. 1980); California v. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1010 (1978); General Telephone Co. v. FCC, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969)).

59. *Puerto Rico Tel. Co.*, 553 F.2d at 699.

are separate from interstate commerce and which do not substantially affect interstate communication.[60] However, the court concluded, this limitation does not force the FCC to stand idly by while a state imposes regulations which *in effect* encroach substantially upon the FCC's authority over interstate communications.[61] As a result, the FCC was allowed to preempt state regulations that were unreasonable.[62]

Likewise, the FCC should have jurisdiction over equipment that makes cellular communication possible. Antenna towers in particular can be subjected to unreasonable zoning regulations when their heights and locations are restricted or prohibited by local zoning codes. Indeed, the increased cost and diminished signal quality associated with building shorter antennas and locating those antennas farther than one-quarter of a cell's radius from the ideal should empower the FCC to preempt the zoning ordinance.[63] Such ordinances have the *effect* of encroaching on the FCC's authority over cellular communications.

In the words of the Court of Appeals for the District of Columbia Circuit, "If the Act's goal of providing uniform, efficient service is ever to be realized, the Commission must be free to strike down the costly and inefficient burdens on interstate communications which are sometimes imposed by state regulation."[64] The burden of demonstrating that a zoning regulation negates a valid federal policy will fall squarely on the shoulders of the FCC.[65] Therefore, one must conclude that when the FCC determines that national intervention is required, it will issue an order that preempts zoning regulation. Until then, the cellular providers will be forced to prove in court that preemption is warranted in cases involving particular ordinances or cell sites.

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60. *Id.* at 700.

61. *Id.*

62. *Id.*

63. National Association of Regulatory Utility Commission v. FCC, 746 F.2d 1492, 1501 (D.C. Cir. 1984) (it is within the FCC's jurisdiction to preempt state's prohibition on sale of intrastate wide area telephone service by secondary purchasers).

64. *Id.* at 1501. *See also* National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989) (it is within the FCC's jurisdiction to preempt state regulation that necessarily thwarts the achievement of a free and competitive inside wiring market).

65. *NARUC v. FCC*, 880 F.2d at 430-31.

B. Extent of Federal Involvement and Scope of Federal Interest

The FCC has promulgated rules that relate to land use and zoning in numerous ways. For example, a cellular service provider must build its transmitters to ensure security,[66] must describe the types and heights of antenna structures to the FCC prior to construction,[67] must not build towers that are a hazard to air navigation,[68] and further must limit the height of its antenna towers based upon the power output of the particular antenna's transmitter.[69] As recently as 1990, the FCC promulgated additional rules requiring an examination of the environmental impact of a proposed cell site as a prerequisite to construction of the site.[70] However, FCC regulation in a particular area, taken alone, will not necessarily preempt state regulation in that same general area.[71] The Minnesota Supreme Court applied this precise rule in *Holiday Acres No. 3 v. Midwest Federal Savings and Loan Association of Minneapolis*.[72] In *Holiday Acres*, the plaintiffs sought to set aside the "due-on-sale clause" contained in the mortgage of the defendant, a federally chartered savings and loan.[73] The defendant argued that Federal Home Loan Bank Board regulations preempted the Minnesota Court's determination that the clause could not be enforced.[74]

The *Holiday Acres* court first determined that the Bank Board did not expressly preempt the operation of state law.[75]

66. 47 C.F.R. § 22.908 (1991).
67. 47 C.F.R. § 22.15(c) (1991).
68. 47 C.F.R. § 22.109(a) (1991).
69. 47 C.F.R. § 22.905 (1991).
70. 47 C.F.R. § 22.913(a)(10) (1991).
71. Even where federal regulations are "pervasive," if a scheme of federal-state cooperation was contemplated by the federal legislation, state regulations in the same area are not preempted. *See* New York Department of Social Services v. Dublino, 413 U.S. 405, 414-15 (1973). Furthermore, the FCC reserved the "facilities" of licensed cellular carriers to state regulation. Public Mobile Radio Services, Final Rule, 47 Fed. Reg. 10,018, 10,034 (1982). This may point to local building code regulation, not necessarily zoning regulation.
72. Holiday Acres No. 3 v. Midwest Sav. and Loan Ass'n of Minneapolis, 308 N.W.2d 471 (Minn. 1981), (questioned in Gate Co. v. Midwest Fed. Sav. and Loan Ass'n, 324 N.W.2d 202, 206 (Minn. 1982), and criticized in Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 170 n.23 (1982)).
73. *Id.*
74. *Id.* at 474.
75. *Id.* at 474-77.

Recognizing that due-on-sale clauses are traditionally matters of state concern and that principles of state law could act concurrently with federal regulations to either uphold or invalidate due-on-sale clauses, the court determined that "traditional state law rules of equity and law" controlled in the case of concurrent federal regulation of the industry.[76] In doing so, the court rejected the argument that federal permission equated with federal preemption.[77]

The relative importance of the federal regulations was compared to the state's interest in preserving and applying its rules of law and equity when the *Holiday Acres* court determined that state law forbidding application of the clause would not frustrate the purposes of the federal regulations allowing the use of the clause.[78] The court noted that "[p]roperty law . . . is traditionally an area of concern for the states."[79] This principle would certainly apply when land use laws are called into question. However, the United States Supreme Court easily tossed that argument aside when it reached the opposite conclusion in *Fidelity Federal Savings and Loan v. de la Cuesta*.[80] The *de la Cuesta* Court demonstrated as follows:

> These principles [of federal preemption] are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."[81]

Just two months after the *de la Cuesta* case was decided, the Minnesota Supreme Court was faced with the identical preemption question that controlled in *Holiday Acres*.[82] Preserving and defending its earlier decision to the extent possible, the Minnesota court noted that "*de la Cuesta* applies only to lending institutions regulated by the Federal Home Loan Bank Board . . . . *Holiday Acres* and other pertinent Minnesota law still govern

76. *Id.* at 484.
77. *Id.* at 479.
78. *Id.* at 479-80.
79. *Id.* at 479.
80. 458 U.S. 141, 153 (1982).
81. *Id.* (quoting Free v. Bland, 369 U.S. 663, 666 (1962); Ridgway v. Ridgway, 454 U.S. 46, 54-55 (1981)).
82. Gate Co. v. Midwest Fed. Sav. and Loan Ass'n, 324 N.W.2d 202 (Minn. 1982).

all other institutions in this state that lend funds for home mortgages."[83]

A further important principle of federal preemption is the fact that state courts will strain to decide that state and local laws are not preempted.[84] Presumably, the best way to avoid this predisposition against federalism is for a cellular provider who seeks relief based upon FCC preemption to have its case decided in a federal court.[85] Naturally, the federal district courts have original jurisdiction in cases such as this which involve the Constitution and laws of the United States.[86]

In any event, the FCC's licensing of a cellular service provider, taken alone, will not support federal preemption of local zoning regulations.[87] One commentator summarized this rule by stating that "[w]here federal and state or local enactments overlap in their effects on non-governmental activities, the proper judicial approach is to reconcile the operation of both statutory schemes rather than hold one completely ineffectual."[88]

Even though federal regulation may not be sufficiently extensive to preempt zoning ordinances, the scope of the federal interest in promoting cellular still points toward preemption. The FCC has explicitly determined that there is a nationwide need for cellular telephones.[89] In that light, the FCC found as follows:

> We expect cellular to become an important communications tool, the extensive use of which can be of significant benefit to the American economy and to the more general public interest, and we are accordingly anxious to have it implemented as quickly as possible

83. *Id.*

84. *See also* Pikop v. Burlington N. R.R., 390 N.W.2d 743 (Minn. Ct. App. 1986), *cert. denied*, 480 U.S. 951 (1987).

85. *But see* Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550 (Minn. 1984) (FCC regulations preempted state tort law).

86. 28 U.S.C. § 1331 (1988).

87. This is consistent with holdings in several states that zoning ordinances regulating radio and antenna heights are not preempted by federal licensing of radio stations. Phillip E. Hassman, Annotation, *Application of Zoning Regulations to Radio or Television Facilities*, 81 A.L.R.3d 1086, 1091-93 (Supp. 1992) (cited in Louis S. Sorell, *Federal Preemption of State and Local Zoning Regulation of Satellite Earth Stations*, COMM. AND THE LAW, Aug. 1987, at 31, 43). Unlike other radio antennas, however, the constraints of cellular engineering dictate the required height and location of each cellular antenna.

88. 3 RATHKOPF, *supra* note 39, § 31.05.

89. Public Mobile Radio Services, Final Rule, 47 Fed. Reg. 10,018, 10,033 (1982).

> . . . . We believe that cellular is important enough to the public interest to warrant special attention to avoid delays.[90]

To protect the public interest that is served by cellular, the FCC requires that a potential licensee be legally, financially, technically and otherwise capable of rendering cellular service.[91] Once the license is granted, the cellular system operator must provide reliable service to its customers.[92] In addition, the FCC is considering additional regulations which pertain to renewals of cellular licenses and which will require licensees to demonstrate their ability to continue to provide cellular service by expanding system capacity to meet increasing demand.[93] The scope of the federal interest involved—the economic and general welfare of the country—is broad indeed. When local zoning regulation prevents construction of a cell site, that local regulation should be preempted. However, this same argument has failed when ham radio operators have tested the validity of local zoning ordinances.[94]

For example, in *Guschke v. City of Oklahoma City*, the Tenth Circuit Court of Appeals was asked to decide whether "general federal encouragement of amateur radio together with the broad federal scheme regulating radio and telecommunications through the FCC suggests preemption."[95] The general statements of legislative or regulatory intent that amateur radio is socially important and that it should be promoted was simply not enough to support a finding of federal preemption in *Guschke*.[96]

Far from the amorphous goals of amateur radio, however, cellular communications provide a specific, economic benefit to the nation by making the members of its population more pro-

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90. *Id.*

91. 47 C.F.R. § 22.901(a) (1991).

92. If a provider turns down a request for cellular service, it must demonstrate to the FCC the manner in which capacity will be increased to accommodate demand. 47 C.F.R. § 22.914 (1991).

93. Standards for Conducting Competitive Renewal Proceedings in the Domestic Public Cellular Radio Telecommunications Service, Proposed Rule, 55 Fed. Reg. 39,020, 39,021 (1990).

94. *See, e.g.*, Guschke v. City of Oklahoma City, 763 F.2d 379 (10th Cir. 1985).

95. *Id.* at 384.

96. Acknowledging that "amateur radio plays an important societal function," the Court noted that "[f]ederal recognition of this function, however, is insufficient to preempt local regulation." *Id.* at 384 n.5.

ductive.[97] Even if the scope of the federal interest in cellular will not generally support the proposition of federal preemption of zoning ordinances, however, these ordinances can be preempted when compliance with both federal and local regulation is impossible. In other words, if the local regulation "stands as an obstacle" to the accomplishment of the federal scheme of making cellular service available nationwide, the local regulation will be struck down.[98]

C. Impossibility of Concurrent Compliance and Frustration of Federal Scheme

The case-by-case approach favored by the courts to analyze zoning ordinances[99] is readily applicable to an examination of this third basis for preemption. The Minnesota Supreme Court has identified this as a situation where "compliance with both the federal and state law is a physical impossibility."[100] The United States Supreme Court applied this reasoning to FCC regulations in *Capital Cities Cable, Inc. v. Crisp*.[101]

The plaintiffs in *Capital Cities* argued that FCC regulation of cable television preempted the State of Oklahoma's prohibition of alcoholic beverage advertising on television.[102] The irreconcilable conflict between federal and state regulation arose because the FCC required cable operators to carry the signals from local and national television stations without deletion or alteration.[103] Stations from states outside Oklahoma, however, had broadcast banned advertisements.[104]

Because the state and federal regulations could not be reconciled, the Supreme Court held that "[s]ince the Oklahoma law, by requiring deletion of a portion of these out-of-state signals, compels conduct that federal law forbids, the state ban clearly 'stands as an obstacle to the accomplishment and execution of the full purposes and objections' of the federal regulatory

97. *See* Keller, *supra* note 1, at 87.
98. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
99. Connor v. Township of Chanhassen, 81 N.W.2d 789, 798 (Minn. 1957).
100. Pikop v. Burlington N. R.R., 390 N.W.2d 743, 748 (Minn. Ct. App. 1986), *cert. denied* 480 U.S. 951 (1987).
101. 467 U.S. 691.
102. *Id.* at 694-97.
103. *Id.* at 705-06.
104. *Id.* at 706.

scheme."[105]

A local zoning ordinance which limits the height of a cellular antenna tower (or which completely prohibits construction of a cell site) should likewise give rise to federal preemption when it stands as an obstacle to the continued proliferation of cellular service.

The question of preemption in this final analysis is determined by whether there is a conflict between the local and federal regulations. This analysis requires more than a simplistic, mechanical reading of the competing local and federal regulations to determine whether they overlap.[106] The purposes of the FCC regulations, as stated in the Code of Federal Regulations or as demonstrated by the regulatory history, must not be frustrated by local ordinances.[107] The single most apparent federal objective is the promotion of reliable and readily available cellular service in the nation.

This goal of nationwide cellular service pervades the regulatory history[108] and manifests itself in the regulations imposed on cellular providers. When a cellular license is first granted, the FCC mandates that the licensee provide service to at least seventy-five percent of either the land area or the population within the boundaries of the geographic area encompassed by the license.[109] Even after this minimum coverage is established within the Cellular Geographic Service Area (CGSA), the FCC requires that the licensee operate its system so that reliable service is available to all who request it.[110]

Each cell within any particular CGSA has a limited capacity because the number of frequencies assigned by the FCC for cellular use is limited. To increase capacity, providers must construct new cell sites. Naturally, those sites must be located where callers demand service—the capacity of the system must be increased in the areas where demand is greatest. New cell

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105. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))

106. Jan Lawrence Zegarac, *Local Regulation of Amateur Radio Antennae and the Doctrine of Federal Preemption: The Reaches of Federalism*, 9 PAC. L.J. 1041, 1051-53 (1978).

107. *See* City of Burbank v. Lockhead Air Terminal, Inc., 411 U.S. 624, 633 (1973).

108. Public Mobile Radio Services, Final Rule, 47 Fed. Reg. 10,018, 10,033 (1982).

109. 47 C.F.R. § 22.903(a) (1991).

110. 47 C.F.R. § 22.914 (1991).

sites also are built to improve the reliability of the cellular system by providing coverage exceeding the seventy-five percent minimum initially required for the provider's license. In either case, cellular providers must strive to provide reliable, readily available service as required by the FCC.

Significantly, the *Capital Cities* Court did not require that the cable television operators be foreclosed from all options before the doctrine of federal preemption applied.[111] The factual record demonstrated that "developing the capacity to monitor each signal and delete every wine commercial before it is retransmitted would be a prohibitively burdensome task."[112] The Supreme Court agreed with the district court's finding that deleting the banned advertisements simply was not feasible.[113]

Similarly, when a municipality limits or prevents construction of a cell site, alternatives to provide coverage may exist. However, the *feasibility* of the alternative controls the decision. If building multiple cells around the offending municipality is required, the cellular provider may be forced to do so at the expense of constructing other cells. This, in turn, may only be done at the cost of reliable coverage for other areas within the cellular system. In addition, the topography of an area and the design of the cellular system also may render infeasible the provider's alternatives. If this is the case, the local ordinance is properly preempted by federal law.

If a municipality seeks to prohibit construction of a cell site through its zoning laws, it frustrates the objective of the federal scheme to make reliable cellular service available. When no alternative site is available to the cellular service provider, federal law should preempt local ordinances. When an alternative does exist, however, or when the cellular provider is able to comply with local zoning ordinances and still provide reliable service to all subscribers who request it, a court probably will rule that the local ordinances are not preempted.

III. CONCLUSION

The authors of a recently published book on cellular design

111. 467 U.S. at 707-08.
112. *Id.* at 707.
113. *Id.* at 707-08.

and engineering aptly summarized the current state of cellular technology as follows:

> The public expectation is now boundless, and the pressure to create the "personal communications" environment in which every adult carries a universal personal terminal to meet the bulk of his or her communications needs is already being felt in the international telecommunications planning community. Progress is certain to be rapid and sustained, with technologies currently discarded as too ambitious being regularly re-appraised and developed. The challenges and the opportunities for mobile radio engineers have never been greater.[114]

No less challenging are the tasks that face local zoning authorities. When those authorities fail to meet the challenge, however, developers of cellular communication systems inevitably will call upon the courts.

Resolving the constitutional questions surrounding the preemption of local zoning laws may depend heavily upon the facts of a particular case and upon the specific language of the challenged ordinance. To date, the courts have shown a reluctance to sweep state regulations aside. Nonetheless, when a zoning ordinance (or other state or local law) deprives the cellular provider of all feasible opportunities to supply readily available, reliable cellular coverage to the public, the ordinance should be stricken because it frustrates the vital national interest in developing the cellular network.

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114. J. Parsons & J. Gardiner, Mobile Communications Systems 288 (1989).

The Lowest Unit Charge Provision of the Federal Communications Act of 1934, as Amended, and its Role in Maintaining a Democratic Electoral Process

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I. Introduction

> In a representative democracy, the critical link between government and the people is the system of free and open elections, through which people choose who will represent their views in matters of public policy. Our electoral system is based on assuring citizens that all views will be given a fair chance to be heard, that all candidates will have a fair chance to win election by proving popular support, and that no one sector or narrowly focused interest will have the untrammelled opportunity to dominate the process and thus overrule the public good. . . . For as the sense of legitimacy of our elections is eroded, so too is the fundamental legitimacy of government itself.[1]

Money has become a powerful force in our electoral process and is one of the greatest determinants of our political representation. The high costs of political advertising is a major reason why money has such a dominant role in the electoral process. Since 1972, the costs for political advertising have increased dramatically. Expenditures for political advertising on television alone increased from $24.6 million in 1972 to approximately $228 million in 1988, which is nearly a ten-fold increase over a 16-year period.[2]

This increase has prompted political candidates to question the sufficiency of the political programming laws, especially the lowest unit charge provision.[3] Congress enacted the lowest unit charge to give candidates a "break" on advertising rates in an effort to restore the integrity of the democratic electoral process. If candidates are spending more money each election year on political advertising, the lowest unit charge provision needs to be evaluated to determine whether the provision is ineffective and whether the provision or other factors are causing the increased spending.

This Comment will focus on the lowest unit charge provision and its ability to provide a fair democratic electoral process. The first section of the Comment explains the statutory definition of the lowest unit charge provision and the associated federal regulations and provides an analysis of the provision's legislative history. Section two delineates the Federal Communications Commission's efforts at interpreting and enforcing the

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1. H.R. Rep. No. 340, 102d Cong., 1st Sess. 7-8 (1991).
2. *Id.* at 23.
3. 47 U.S.C. § 315(b)(1) (1988).

lowest unit charge provision since its enactment. This section also analyzes recent Commission activity that has spawned litigation over the lowest unit charge provision. Section three examines the economic realities that broadcasters and candidates encounter when stations violate the lowest unit charge provision. Section four discusses the political realities facing the provision in Congress. Section five analyzes the relationship between the First Amendment and the lowest unit charge provision as vehicles for attaining a fair democratic electoral process.

II. Origin and Definition of the Lowest Unit Charge Provision

A. *The Statute and Federal Regulations*

The lowest unit charge provision establishes a *maximum* media rate that a broadcasting station[4] may charge a legally qualified political candidate for the 45-day period preceding a primary or the 60-day period preceding an election. 47 U.S.C. § 315(b)(1) (hereinafter Section 315(b)(1)) provides,

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, *the lowest unit charge of the station for the same class and amount of time for the same period.*[5]

The candidate is entitled to the lowest unit rate once he meets the following requirements. The candidate must 1) request advertising time from the broadcasting station; 2) personally appear in the advertisement via his voice or image; 3) actually use the requested advertising time within the specified time period in the statute; and 4) use the requested advertising time in connection with his campaign.[6] Once the candidate meets these four requirements, the burden shifts to the broad-

4. For purposes of this Comment, broadcasting station includes television stations, radio stations, and cable television systems.

5. 47 U.S.C. § 315(b)(1) (1988) (emphasis added).

6. NATIONAL ASS'N OF BROADCASTERS, POLITICAL BROADCAST CATECHISM 28 (12th ed. 1988).

casting station to provide the lowest unit rate for the same class and amount of time for the same period.

The statute does not define a particular method or formula for determining the lowest unit rate of a broadcasting station. Congress delegated that responsibility to the Federal Communications Commission (hereinafter Commission).[7]

The Commission defines lowest unit charge as the same rate as the most favorable rate charged to any of that station's commercial advertisers for that same class and amount of time for the same time period.[8] "[I]t means that candidates must be given all discounts, based on volume, frequency or any other factor, that are offered to the station's most favored commercial advertiser for the same class and amount of time for the same period,"[9] regardless of the number of spots purchased by the candidate. The "most favored commercial advertiser" standard also prohibits rate discrimination between candidates running for the same office as well as discrimination in station practices, regulations, facilities, and services.[10]

To compute the lowest unit rate, the station's classes of time, amount of time, and period of time must be defined. Under Section 315(b)(1), broadcasting stations "do not have total discretion to define the classes of time they offer."[11] The Commission has the authority to define the statutory terms - "class," "amount of time," and "period." The Commission defines "class" as the station's rate categories, such as non-preemptible, preemptible, or run-of-schedule spots.[12] "Amount

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7. Congress expressly delegated authority to the Commission to prescribe rules and regulations to carry out Section 315. *See* 47 U.S.C. § 315(d) (1988).

8. 47 C.F.R. §§ 73.1940, 76.205 (1991). *See also* The Law of Political Broadcasting and Cablecasting: A Political Primer, 100 F.C.C.2d 1476, 1513 (1984)[hereinafter 1984 Political Primer].

9. 1984 Political Primer, *supra* note 8, at 1515.

10. 47 C.F.R. §§ 73.1940, 76.205 (1991).

11. Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations, Public Notice, 4 FCC Rcd. 3823, 3824, (1988) (citing Hernstadt v. FCC, 677 F.2d 893 (D.C.Cir. 1980)).

12. 1984 Political Primer, *supra* note 8, at 1515.

"Non-preemptible" or "fixed" spots run at a guaranteed time, cannot be preempted unless an emergency, and generally the station's highest rate category. *See* Hernstadt v. FCC, 677 F.2d 893, 895 (D.C. Cir. 1980).

"Preemptible" spots are scheduled for a specific time, but the station has the right to sell that time to the highest bidder. The original advertiser must be notified of the preemption and has the right to pay the higher rate to preserve his airtime.

of time" is the length of the time purchased, such as 30 or 60 seconds.[13] "Period" is the time of the broadcast day, such as prime time for television, drive time for radio.[14]

Although the statute mandates the lowest unit charge as a political broadcast rate, and federal regulations define how to determine that rate, the lowest unit charge provision is "the most intricate and most difficult part of the political broadcast rules."[15] The complexity does not lie in the plain-meaning of the statute or regulations but arises from statutory application to the changing and sophisticated sales practices of the broadcasting industry.[16] The Commission's interpretation or enforcement of the lowest unit charge provision in consideration of industry sales practices generally involves an analysis of the legislative intent of Section 315(b)(1). The Commission focuses on whether the particular industry sales practice at issue frustrates the will of Congress as reflected in the legislative history of Section 315(b)(1). Thus, one must review the legislative history of Section 315(b)(1) and understand the national goals that Congress sought to achieve by regulating political broadcast rates.

B. Legislative History Of Section 315(b)(1)

Congress amended Section 315(b) of the Communications Act of 1934 in 1952 "to prohibit broadcasters from charging ad-

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"Preemptible" spots cost less than non-preemptible spots but more than "run-of-schedule" spots. There are also different categories within "preemptible" spots rates, such as "immediately preemptible". The "immediately preemptible" spots are cheaper than "preemptible spots" because they are sold to a higher bidder without notice and with no option to buy. *Id.*

"Run-of-Schedule" or "ROS" spots generally run at the discretion of the station. They are scheduled at the last minute to fill in gaps of unsold air time. ROS spots generally run when the station is not sold out. ROS spots are cheaper than "non-preemptible" and "preemptible" spots. *Id.*

13. 1984 Political Primer, *supra* note 8, at 1515.

14. *Id.*

15. FCC Seminar on Political Broadcasting (FCC broadcast, Feb. 25, 1992) (statement of Milton Gross, Chief of Political Programming Branch, Mass Media Bureau, FCC). *See also* Craig J. Blakely, *Monday Memo*, BROADCASTING, Apr. 1, 1991 at 22 ("The determination of the lowest unit rate is a complex matter even for the FCC.").

16. Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations, Public Notice, 4 FCC Rcd. 3823 (1988)[hereinafter 1988 Public Notice]. *See also* Codification of the Commission's Political Programming Policies, Report and Order, 7 FCC Rcd. 678 (1992).

vertising rates that discriminated in favor of commercial advertisers and against candidates."[17] The statute required broadcasting stations to charge legally qualified candidates no more than "charges made for comparable use of such station for other purposes."[18] This "comparable use" provision was in response to the increasing number of incidents of candidates being charged substantially higher rates than commercial advertisers for comparable time.[19] Thus, Congress sought to eliminate the broadcaster's disparate treatment of candidates and commercial advertisers with regards to rates.

Congress amended Section 315(b)(1) again in 1972 as part of Title I of the Federal Election Campaign Act of 1971.[20] Congress' primary concern was the integrity of the electoral process which had eroded since the 1968 federal election campaign.[21] The Senate Commerce Committee reported that the increasing costs of campaigning for public office "pose[d] a real and imminent threat to the integrity of the electoral process."[22] The Committee considered the high cost of campaigning via the electronic media as a threat to the integrity of the electoral process, because "[t]hese rising costs were . . . the most critical barrier to informing the voters of America."[23] Congress was also concerned that "[t]he cost of campaigning, chiefly swollen by the cost of television, will exclude the honest poor" from American politics.[24] Thus, the national goal of the Federal Election Cam-

17. H.R. REP. NO. 340, 102d Cong., 1st Sess. 16 (1991).

18. Communications Act Amendments of 1952, Pub. L. No. 82-554, § 11, 66 Stat. 717 (1952).

19. S. REP. No. 96, 92d Cong., 1st Sess. 22 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1773, 1775. *See also* Hernstadt v. FCC, 677 F.2d 893, 895 n.5 (D.C. Cir. 1980).

20. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 103, 86 Stat. 4, 7 (1972).

21. S. REP. NO. 96, 92nd Cong., 1st Sess. 32 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1773, 1785.

22. *Id.* at 31, 1972 U.S.C.C.A.N. at 1785.

23. *Id.* at 22, 1972 U.S.C.C.A.N. at 1775.

24. *Id.* (quoting *Hearings on S. 2876 Before the Senate Committee on Commerce*, 91st Cong., 1st Sess. 51 (1970)). *See also* S. REP. NO. 96, 92nd Cong., 1st Sess. 32 (1971), *reprinted in* 1972 U.S.C.C.A.N. at 1785 ("people are becoming cynical because of these high costs . . . . One American interviewed . . . was quoted as saying, 'If you don't have a million bucks, you might as well forget about running for political office these days.' ").

paign Act of 1971 was to preserve the democratic electoral process from the effects of high cost campaigning.

To achieve this national goal, Congress enacted the lowest unit charge provision to "give candidates for public office greater access to the media so that they may better explain their stand on the issues, and thereby more fully and completely inform the voters. . .[and] halt the spiraling cost of campaigning for public office."[25]

Congress enacted the lowest unit charge as the political broadcast rate in order to put "the candidate on par with a broadcast station's most favored commercial advertiser."[26] Congress felt that "without depriving the voter of the opportunity of making an intelligent choice," the lowest unit charge rate was "an effective and realistic way for lowering campaign costs."[27] At the same time, Congress also hoped that the lowest unit charge rate would minimize the economic impact and burden this provision would have on smaller broadcasting stations.[28] The language of lowest unit charge provision allowed for the "use of each broadcaster's own commercial practices rather than imposing on him an arbitrary discount rate applicable to all stations without regard to their differences."[29]

Congress restricted the availability of the lowest unit charge rate to the 45- and 60-day time period as an incentive for candidates to shorten their campaign period, thereby also reducing campaign costs.[30]

Although the lowest unit charge provision was considered a realistic limitation on broadcasters, the Committee noted that "limitations that are adequate and realistic are not enough, they

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25. *Id.* at 20, 1972 U.S.C.C.A.N. at 1773-74.

26. *Id.* at 27, 1972 U.S.C.C.A.N. at 1780.

27. S. REP. NO. 229, 92d Cong., 1st Sess. 116, *reprinted in* 1972 U.S.C.C.A.N. at 1853 (supplemental views of Messrs. Prouty, Cooper, and Scott).

28. Hernstadt v. FCC, 677 F.2d 893, 899 (D.C. Cir. 1980) (citing to *Federal Election Campaign Act of 1971: Hearings on S. 1, S. 382, and S. 956 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 92nd Cong., 1st Sess. 412 (1971) (remarks of Sen. Pastore)). *Contra* 117 CONG. REC. 26,351 (1971) (Sen. Stevens opposed lowest unit rate provisions because of the adverse economic impact on small broadcasters.).

29. S. REP. NO. 96, 92nd Cong., 1st Sess. 27, *reprinted in* 1972 U.S.C.C.A.N. at 1780.

30. *Id.* at 28, 1972 U.S.C.C.A.N. at 1781.

must also be *workable* and *enforceable*."[31] Thus, Congress intended to make the lowest unit charge provisions workable and enforceable in the broadcasting marketplace so that more candidates would have greater access to the voters. Voters would gain exposure to a greater number of political messages and, in turn, this would enable voters to make informed decisions on political issues and representation.

Congress believed that the lowest unit charge provision was clear and could be easily applied by the Commission.[32] However, since its enactment 20 years ago, numerous judicial and administrative proceedings concerning the provision demonstrate that the provision is far from "easily applied" questionable as to its effectiveness, and debatable as to its enforceability.

Many broadcasters and candidates contend that calculating the lowest unit charge is confusing, and both "agree that the FCC bears ultimate responsibility for the confusion."[33]

III. The Federal Communications Commission's Enforcement Of Section 315(b)(1)

Since the enactment of the lowest unit charge provision in 1972, the Commission has made a concerted effort to interpret, remind, and inform broadcasters and candidates of their respective obligations and rights under the provision.

In 1972 the Commission issued a political primer defining the statutory terms of Section 315(b)(1) and explaining its application to broadcasting sales practices and political candidates' purchasing practices.[34] The Commission updated the 1972 Political Primer in 1978 and 1984 to include significant rulings by the Commission.[35] The three Political Primers are organized in a concise manner using a question-and-answer format that is comprehensible to the general public.

Chairmen of the Commission have testified at congressional

31. *Id.* at 33, 1972 U.S.C.C.A.N. at 1786 (emphasis added).

32. *Id.*

33. Doug Halonen, *More Stations Face Suits Over Political Ads*, ELECTRONIC MEDIA, Sept. 16, 1991, at 1.

34. Use of Broadcast and Cablecast Facilities By Candidates for Public Office, 34 F.C.C.2d 510 (1972).

35. Amendments of the Commission's Rules Relating to Broadcasts and Cablecasts by Legally Qualified Candidates for Public Office, Report and Order, 68 F.C.C.2d 1049 (1978); 1984 Political Primer, *supra* note 8, 100 F.C.C.2d 1476 (1984).

hearings outlining the broadcasters' obligations under the lowest unit charge provision.[36] The Commission also issued reminders to broadcasters in 1974 and 1988 as to their obligations under the lowest unit charge provision.[37] Due to the growing need for candidates to understand political programming laws, the Commission's Office of Consumer Affairs held a public seminar to discuss recent changes in the political broadcast rules.[38]

Despite these efforts, some individuals claim that the Commission's rulings in the 1988 Public Notice and the 1990 Programming Audit Report created confusion among broadcasters and candidates as to their respective obligations and rights.[39]

A. *1988 Public Notice*

The Commission issued the 1988 Public Notice as a reminder to broadcasters of the lowest unit charge provision and as an acknowledgement of its own practice of interpreting the lowest unit charge provision in light of evolving industry sales practices.[40] Recognizing that the industry sales practices had changed dramatically since 1972,[41] the Commission made three

36. *The Campaign Cost Reduction Act: Hearings on S. 2657 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation*, 100th Cong., 2nd Sess. 10 (1988) (testimony of Dennis R. Patrick, Chairman, FCC); *Hearings on H.R. 5756 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 2nd Sess. 7 (1990) (testimony of Alfred C. Sikes, Chairman, FCC).

Some of the FCC Commissioners also have made public remarks concerning rights and obligations under the political broadcasting rules. *See* James H. Quello, Commissioner, FCC, Political Broadcast Rules, Remarks Before the Indiana Broadcasters Association Meeting (Oct. 17, 1991), 1991 FCC LEXIS 5483.

37. Licensee Responsibility under the Amendments to the Communications Act, 47 F.C.C.2d 516 (1974) (Commission reminded broadcasters of their obligation to provide reasonable access under Section 312 which includes the opportunity to purchase reasonable amounts of program time in accordance with Section 315); 1988 Public Notice, *supra* note 16.

38. Telephone Interview with Patti Grace Smith, Chief of the Consumer Assistance & Small Business Division, FCC (Mar. 31, 1992). *See also* FCC Seminar on Political Broadcasting (FCC Broadcast, Feb. 25, 1992).

39. Craig J. Blakely, *Monday Memo*, BROADCASTING, Apr. 1, 1991, at 22. *See also* Doug Halonen, *More Stations Face Suits Over Political Ads*, ELECTRONIC MEDIA, Sept. 16, 1991, at 1.

40. 1988 Public Notice, *supra* note 16, at 3823.

41. The changes in industry sales practices included 1) commercial advertisers generally buying preemptible time which rates vary from week to week; 2) the widespread use of "make goods"; and 3) stations selling each category of preemptible time as different classes of time. *Id.* at 3824.

rules very clear:

1. The lowest unit rate will be determined on a weekly basis recognizing that broadcast advertising can vary substantially from week to week.[42]
2. "Make goods"[43] must be considered in determining the lowest unit rate which is contemplated by Section 315.[44]
3. All preemptible spots are to be treated as a single class of time, "because Section 315's underlying purpose is to ensure that candidates . . . have an affordable means of reaching the electorate. . . ."[45]

The result was the Commission adopting particular industry sales practices in calculating the lowest unit rate and rejecting others.[46] The Commission reached this result by an analysis of whether the sales practice at issue treated the candidate in the same manner as the station's most favored commercial advertiser, and whether the industry sales practice furthered the goals of Section 315.[47] Thus, the Commission articulated standards for calculating the lowest unit rate that are rooted in the legislative intent of Section 315(b)(1). At the same time, the Commission sent a message to broadcasters that the Commission will not factor in those industry sales practices that do not meet the above criteria when calculating the lowest unit rate.

If a broadcaster understands the legislative intent that drives Section 315(b)(1) then the broadcaster should be able to apply the Commission's methodology in determining the lowest unit rate. The confusion may not arise from the rules promulgated in the 1988 Public Notice but from the broadcasters' fail-

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42. *Id.* at 3825 (separate statement of Commissioner Patricia Diaz Dennis).

43. A "make good" is an offer by the station to air a preempted spot at a later date, in the same part of the day as originally purchased, rather than refunding the advertiser. Usually, the advertiser buying a preemptible spot is preempted in favor of an advertiser paying a higher rate. *Id.* at 3823.

44. *Id.* at 3825 (separate statement of Commissioner Patricia Diaz Dennis).

45. *Id.*

46. The Commission rejected the industry practice of treating each category of preemptible time as separate classes of time. The Commission determined that *all* preemptible spots constituted a single class of time, regardless of the weekly rate change. They reminded broadcasters that "broadcasters do not have total discretion to define the classes of time they offer." *Id.* at 3824 (citing Hernstadt v. FCC, 677 F.2d 893 (D.C. Cir. 1981)).

47. *Id.*

ure to use the Commission's methodology in determining the lowest unit charge.

B. 1990 Political Programming Audit Report

In July 1990, the Mass Media Bureau of the Commission audited thirty broadcasting stations in five major U.S. cities "to assess the broadcast industry's compliance with . . . the political programming rules, especially the lowest unit charge requirement."[48] The Bureau reported its findings from the audit on September 7, 1990.

The 1990 Audit Report indicated that at eighty percent of the stations audited, candidates paid higher rates than the most favored commercial advertiser of those stations.[49] These higher rates were attributed to questionable industry sales practices that encouraged candidates to buy higher priced advertising time than commercial advertisers.[50] The Commission also delineated various corrective measures that broadcasters should follow to bring these sales practices and their stations into compliance with the political programming laws in the 1990 Audit Report.[51]

The Commission held an informational seminar on September 13, 1990 to explain the Audit Report and to inform broadcasters, once again, of their obligations under Section 315(b).[52]

Although the 1990 Audit Report was supposed to be an assessment tool, the 1990 Audit Report issued guidelines/rules without allowing a broader segment of the industry to comment

48. Political Programming Audit, Public Notice, 68 R.R.2d 113, 113, 1990 FCC LEXIS 4700, at *1 (1990) [hereinafter 1990 Audit Report].

The stations were located in Cincinnati, Ohio; Dallas-Fort Worth, Texas; Philadelphia, Pennsylvania; Portland, Oregon; and San Francisco, California. The Commission selected the stations based on their geographical diversity, audience market share and signal reach. Interview with Milton O. Gross, Chief of the Political Programming Branch, Mass Media Bureau, FCC (Feb. 18, 1992).

49. 1990 Audit Report, *supra* note 48, at 4837.

50. *Id.* at 4835, 4837. *See* Section IV(A) of this Comment for a discussion of the questionable industry sales practices.

51. 1990 Audit Report, *supra* note 48, at 4838. The corrective action consisted of: 1) full disclosure of all rates and packages available to commercial advertisers; 2) no new classes of time that result in higher rates to candidates; 3) maintenance of a political file in an organized manner; 4) no advance ban or limitations in the sale of advertising time to federal candidates.

52. Informational Seminar On the Political Programming Law, 1990 FCC LEXIS 4938 (1990); Questions and Answers Relating to Political Programming Law, Memorandum Opinion and Order, 5 FCC Rcd. 5167, 5169 (1990).

on the findings or the issues raised by it. Broadcasters argued that thirty stations were not necessarily representative of an industry with over 100,000 stations. They also contended that the Commission violated the Administrative Procedure Act for failing to give broadcasters the opportunity to comment prior to using the information from the audit as an industry-wide enforcement weapon.[53]

By December 1991, the 1990 Audit Report had generated a substantial amount of litigation before state and federal courts as well as the Commission,[54] prompted a declaratory ruling on the Commission's jurisdiction over Section 315(b)(1) violations,[55] and produced a new complaint procedure for lowest unit charge violations.[56] The reaction to the 1990 Audit Report would also compel the Commission to issue a notice of proposed rulemaking[57] which then resulted in codification of the Commission's political programming policies.[58] For many of the audited stations, the 1990 Audit Report would be the basis for the Commission's Notices of Apparent Liability and Letters of Admonishment.[59]

C. Notice of Proposed Rulemaking

Within a three-month period following the September re-

53. Comments of National Association of Broadcasters to the Notice of Proposed Rulemaking in MM Dkt No. 91-168 (Aug. 9, 1991) [hereinafter NAB Comments].

54. *See e.g.* Zell Miller for Governor v. Pacific & S. Co., Civil Action No. 1:91-CV-267-RLV (N.D.Ga. 1991); Dickenson v. Cosmos Broadcasting Co., Dkt No. CV-91-67-R (Mont. Cty.,Al. 1991); American Savannah Broadcasting v. Zell Miller for Governor, Civil Action No. CV491-128 (S.D.Ga. 1991); American Hirsch Broadcasting Co. v. Harvey Sloane Campaign, Civil Action No. S91-0064-C (E.D. Mo. 1991). *See also More Stations Face Suits Over Political Ads*, ELECTRONIC MEDIA, Sept. 16, 1991, at 1 (1991) ("22 California television stations joined the growing number of outlets being sued of allegedly overcharging political candidates for advertising time.").

55. Exclusive Jurisdiction With Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, Declaratory Ruling, 6 FCC Rcd. 7511 (1991) [hereinafter Declaratory Ruling].

56. *Id.* at 7513.

57. Codification of the Commission's Political Programming Policies, Notice of Proposed Rulemaking, 6 FCC Rcd. 5669, 5707 (1991) [hereinafter NPRM].

58. Codification of the Commission's Political Programming Policies, Report and Order, 7 FCC Rcd. 678 (1992) [hereinafter Report and Order]. *See* discussion *infra* section III(D).

59. *See* Appendix B of this Comment for a list of audited stations that received Notices of Apparent Liability or Letters of Admonishments from the Commission.

lease of the 1990 Audit Report, the Commission received 5,617 inquiries and complaints concerning the Commission's political programming policies.[60] This significant increase[61] prompted the Commission to issue a Notice of Proposed Rulemaking on June 26, 1991, almost a year after the 1990 audit. The Commission stated in the Notice,

> [W]e recognized that there is no single, up-to-date written source to which the public can turn for guidance on how to comply with our political programming requirements. Consequently, the Commission continues to receive numerous questions from stations, media buyers and candidates about our political programming policies. . . . [A]lthough the 1988 Public Notice, the 1990 Audit Report and 1990 Questions and Answers offer substantial guidance on certain issues (such as computation of the lowest unit charge), they do not address other important political programming issues that have come to light since the Primer was last updated. We also note that, as industry sales practices continue to evolve, there may be changes in those practices that implicate our political programming policies and should be considered when implementing the statutory requirements.[62]

Although the Commission recognized its obligation to provide notice and comment on the industry sales practices, the Commission reiterated that it had already provided stations and candidates with three guides for computing the lowest unit rate.

In the Notice, the Commission requested comments on the following matters as they related to the lowest unit charge provision.

1. Information on prevailing industry sales practices.[63]
2. Whether the principles that the Commission has articulated over the years concerning the lowest unit charge provision "are useful in today's rapidly changing advertising marketplace, and to propose modifications or further clarifications where such changes are believed necessary."[64]
3. "How [the Commission's] 'fire-sale' policy should apply to dif-

60. NPRM, *supra* note 57, at 5707. 5,360 of the 5,618 inquiries and complaints were received by telephone. *Id.*

61. There was more than a fifty percent increase in the number of telephone inquiries and complaints received from July 1, 1990 to September 30, 1990, which corresponded with the dates of the audit and the release of the 1990 Audit Report. Interview with Milton Gross, Chief of the Political Programming Branch, Mass Media Bureau, FCC (Feb. 18, 1992) (citing statistical data from the Branch's 1990 Fiscal Report).

62. NPRM, *supra* note 57, at 5710.

63. *Id.* at 5711.

64. *Id.* at 5722.

ferent classes of time in light of evolving sales practices."[65]

4. The scope of the broadcasters' affirmative disclosure obligations as outlined in the 1990 Audit Report and 1990 Questions and Answers.[66]

The Commission also used the Notice as another opportunity to explain its position on broadcasters' affirmative duty to disclose to candidates the rate and package options offered to commercial advertisers. "Although we believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirement, we recognize that the Commission has not previously articulated stations' affirmative disclosure duties."[67] Thus, the Commission could not hold broadcasters responsible for their past failure to disclose. However, the Commission used the Notice of Proposed Rulemaking as notice to stations that their present and future failures to disclose may result in enforcement action pending the outcome of the rulemaking process.

D. Codification of the Commission's Political Programming Policies

The Commission issued a Report and Order on December 23, 1991, which is a codification and comprehensive guide to the Commission's political programming policies.[68] With regards to the lowest unit charge provision, the Commission, among other things, adopted the disclosure requirements outlined in the 1990 Audit Report,[69] and revised its policy prohibiting broadcasters

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65. *Id.* at 5707. The Commission's "Fire-sale" policy ". . . provides that a discount on a particular class of time earned by a last-minute buyer establishes the lowest unit charge for that class of time throughout the pre-election period." *Id.* at 5724 (citing 1988 Public Notice, *supra* note 16, at 3824).

66. NPRM, *supra* note 57, at 5727.

67. *Id.* at 5726.

68. Report and Order, *supra* note 58, at 678. In February, 1992, the Commission received Petitions for Reconsideration on several issues governed by the Report and Order. The Commission responded to the issues concerning the lowest unit charge in a Memorandum Opinion and Order released on June 11, 1992. Codification of the Commission's Political Programming Policies, Memorandum Opinion and Order, 7 FCC Rcd. 4611, 4614-20 (1992). In the Memorandum, the Commission clarified and reaffirmed many of its policies on the lowest unit charge that were defined in the Report and Order. *Id.* However, the Commission modified its policy on noncash merchandising/promotional incentives and discontinued the "fire sale" policy. *Id.* at 4618-19.

69. Report and Order, *supra* note 58, at 680.

from creating classes of time.[70]

1. Disclosure Requirements

The Commission decided that broadcasters have an affirmative duty to provide timely, accurate, and complete information on rates *and* sales practices to candidates.[71] This duty includes disclosing "all classes of time, discount rates and privileges afforded to commercial advertisers,"[72] in order "to ensure that candidates are able to avail themselves of their statutory rights and are not steered to purchase more expensive categories of time."[73] Again, the Commission acknowledged that it did not articulate the disclosure requirement before September 1990. However, the Commission stated, "[p]olitical broadcasting obligations are imposed upon station licensees, not on candidates and their representatives. The representatives' or candidates' knowledge, or lack thereof, does not replace the *broadcaster's obligation* to offer candidates the benefits of the lowest rates."[74] Thus, the Commission made it clear they would not sanction industry sales practices that do not promote full disclosure.

2. Creation of Classes of Time

The Commission changed its 1988 policy prohibiting broadcasters from creating classes of time to a policy allowing broadcasters "greater discretion in establishing different classes of time."[75] The new policy permits stations to treat immediately preemptible and preemptible-with-notice spots as separate classes of time.[76] Stations also are permitted to treat non-preemptible and fixed position spots as different classes of time.[77]

Under this new policy, it may appear that the Commission allows the industry sales practices to control the computation of

70. *Id.*
71. *Id.* at 689.
72. *Id.* at 680.
73. *Id.* at 688.
74. *Id.* (emphasis added).
75. *Id.* at 692 (1992). *But see* 1988 Public Notice, *supra* note 16, at 3824 ("[B]roadcasters do not have total discretion to define the classes of time they offer." (citing Hernstadt v. FCC, 677 F.2d 893, 900 (D.C. Cir. 1981))).
76. Report and Order, *supra* note 58, at 691. *But see* 1988 Public Notice, *supra* note 16, at 3824 (The Commission considered all preemptible spots as a single class of time.).
77. Report and Order, *supra* note 58, at 691-92.

the lowest unit charge. However, the Commission does not give stations broad discretion to establish various classes of time. Rather, the Commission limits the station's discretion by imposing a "reasonableness" standard, by requiring full disclosure of all classes of time, and by prohibiting class distinctions that are based solely on price or the advertiser.[78]

The Commission also narrows the station's discretion by stating that "stations may not use class distinctions to defeat the statutory purpose of Section 315(b)."[79] If the class distinctions deny the candidate the same treatment as the station's most favored commercial advertisers, limit the candidate's access to voters, or significantly increase the costs of campaigning, the class distinction violates Section 315(b). It also violates the integrity of the democratic electoral process which lies at the nucleus of the lowest unit charge provision.

3. Ensuring Compliance with the Report and Order

Although the Commission codified its political programming policies, the Commission did not articulate or adopt a particular method at that time to ensure compliance with the Report and Order.

a. Audits

Future audits may be a viable way to ensure compliance. If broadcasters knew that the probability of an audit was great, and lack of compliance resulted in strict penalties, i.e. large forfeitures or loss of license, broadcasters may re-examine the legitimacy of their sales practices as they relate to political broadcasting. Thus, human and monetary resources used to create a high probability of an audit as well as strict penalties are necessary for this method to ensure compliance.

An advantage of the audit is that it does not require candidates to be astute in industry sales practices. It allows the Commission to monitor the sales practices and initiate enforcement without the candidate having to file a complaint. This may save the candidate from spending his resources to initiate enforcement against the violating station.

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78. *Id.* at 691.
79. *Id.*

The disadvantage of the audit method is that some stations that violate the rules may not be encompassed in an audit. The result may mean years before a station is caught and forced to comply.

b. Complaint Procedure

The complaint procedure may be another method to ensure compliance with the Report and Order. This approach does not require the Commission to search for non-compliance. Rather, it waits for the candidate to seek the Commission's assistance. Although the complaint procedure assures that specific violating stations will be dealt with, it requires the candidate to be astute in political programming laws and industry sales practices in order to detect violations.

c. Combined Approach

Another suggested approach is a combination of an audit and the use of a complaint procedure. This combination allows the Commission to deal with general sales practices and specific sales practices that may violate the lowest unit charge provision. Whether the Commission has the financial resources and manpower to do *timely* audits as well as handle complaints in a *timely* manner may present enforcement difficulties.[80]

E. Declaratory Ruling

The 1990 Audit Report prompted many candidates to investigate whether stations had overcharged them for advertising time during their political campaigns. The result was a number of lawsuits filed in state and federal courts against stations in

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80. It appears that the Commission has selected a combined approach to ensure compliance with the Report and Order. In addition to its complaint procedure, the Mass Media Bureau conducted another audit in June, 1992. The 1992 Audit was conducted at 28 stations and two cable systems in ten U.S. cities. It focused on the affirmative disclosure and the proper maintenance of the political file. See Preliminary Political Programming Audit Result, Public Notice, 7 FCC Rcd. 6862 (1992).

The Commission's preliminary findings indicate that its efforts to ensure compliance with the political broadcast rules, particularly since the 1990 audit, has had a positive effect. Twenty-four of the 30 facilities audited in the 1992 Audit complied with the basic political broadcast requirements. Many of the facilities also made "genuine efforts to comply with the revised rules and policies." *Id.*

Georgia, Alabama, and California[81] and the genuine threat of additional suits in eight other states.[82] Concerned over the increasing threat of litigation and its potential costs, broadcasters asked the Commission to intervene and to assert exclusive jurisdiction over lowest unit charge violations.[83] In December 1991, the Commission issued a Declaratory Ruling asserting "that any state cause of action dependent on any determination of the lowest unit charge . . . is preempted by federal law. The sole forum for adjudicating such matters shall be this Commission."[84] The basis for preemption was to assure the certainty and consistency in enforcement and rulings, and Congress had mandated uniform federal policies for political broadcast rates.[85]

The Declaratory Ruling also established a new complaint procedure to resolve lowest unit charge complaints.[86] To invoke the Commission's enforcement procedures for lowest unit charge violations, the complainant must establish a prima facie case consisting of a short, plain statement describing the factual basis for his belief that a specific station violated the lowest unit charge provision.[87] The station, served with the complaint, has ten days to file an answer with the Commission.[88] If the Commission decides that a prima facie case has been established, the

81. *FCC Moves To Stem Lowest Unit Lawsuits*, BROADCASTING, Oct. 7, 1991, at 23.

82. Telephone Interview with Robert Kahn, Attorney for Barnes, Browning, Tanksley & Casurella (Marietta, GA.) (Mar. 6, 1992). (The other states are Florida, Texas, Kentucky, Rhode Island, Virginia, Nebraska, Colorado, and Massachusetts.)

Mr. Kahn is the Lead Counsel for a group of law firms which represent political candidates making claims against broadcasting stations for refunds of overcharged campaign spots. He also represents the Georgia politicians who brought the first in the series of recent suits for alleged overcharges for campaign spots; suing WXIA-TV in Atlanta. *See also* Zell Miller for Governor v. Pacific & S. Co., Civ. Act. No. 1:91-CV-267-RLV (N.D.Ga. 1991).

83. *FCC Moves To Stem Lowest Unit Lawsuits*, BROADCASTING, Oct. 7, 1991, at 23; *FCC Role In Lowest-Unit-Charge Cases Debated*, BROADCASTING, Oct. 28, 1991, at 60.

84. Declaratory Ruling, *supra* note 55, at 7511.

85. *Id.* at 7512. The Commission affirmed its Declaratory Ruling on May 14, 1992 and denied various petitions for reconsideration in Exclusive Jurisdiction with Respect to Potential Violations of the Lowest Unit Charge Requirements of Section 315(b) of the Communications Act of 1934, Order on Reconsideration, 7 FCC Rcd. 4123 (1992).

86. Declaratory Ruling, *supra* note 55, at 7513.

87. *Id.*

88. *Id.*

Mass Media Bureau will issue an order that will give the parties an opportunity to elect mediation, referred to as alternative dispute resolution (ADR), or an evaluation/disposition by the Bureau subject to Commission review.[89] Even if the parties select alternative dispute resolution, the Commission retains jurisdiction over the lowest unit charge violations.[90]

The new complaint procedure raises issues that the Commission will have to resolve to ensure consistency in its enforcement of the lowest unit charge provision.

1. Timeliness

The Declaratory Ruling states that complainants should bring their complaints in a timely manner.[91] However, the Commission gives no clue to what is a timely manner. Recently, the General Counsel of the Commission confirmed the absence of a statute of limitations to file a complaint.[92] Another Commission official stated that since stations are required to keep political files for two years, two years would be the starting point.[93] However, it appears that where candidates have sufficient evidence to show violations, the Commission will pursue the complaint, no matter when it is filed.[94]

The problem with the "timely manner" language is that it is susceptible to various interpretations. Timely manner can be defined by the time requirements for the political file. Thus, the statute of limitation begins to run two years from the date the information was placed in the political file, not necessarily the same date the political advertising aired. Alternatively, the limitation period could begin to run when the violation actually occurred (the airdate) or when the candidate received his invoices (the end of the billing month). In some instances, candidates could argue that the statute of limitations did not start to run until the candidate knew or had reason to know that something was amiss, which in some instances may not have been until he

89. *Id.*

90. *Id.*

91. *Id.* at 7521, n.46.

92. Seminar on Political Broadcasting (FCC broadcast, Feb. 25, 1992) (statement by Robert Pettit, General Counsel, FCC).

93. Seminar on Political Broadcasting (FCC broadcast, Feb. 25, 1992) (statement of Milton Gross, Chief of Political Programming Branch, Mass Media Bureau, FCC).

94. *Id.*

read the 1990 Audit Report.[95]

The Commission may ultimately need to define the relevant time period to put both stations and candidates on notice.

2. Proving the Prima Facie Case

The Declaratory Ruling does not specifically state what constitutes the elements of a prima facie case for a Section 315(b) violation. The Commission gives examples but states, "these examples . . . are not the sole means by which a prima facie case could be established; rather they are merely intended to serve as a useful guide to interested parties."[96] It appears that the Commission will decide on a case by case basis as to whether a prima facie case has been established.

The real issue is how will a complainant know before he submits a complaint that he has established sufficient facts for a prima facie case? If the Commission decides that the complainant has not established a prima facie case, the complaint procedure does not provide for an amended complaint process until after the Mass Media Bureau makes a determination that a prima facie case has been established.[97] Thus, there is no mechanism by which a complainant can amend his complaint in order to get the Commission to investigate the complaint.

The Commission should not be in a position to redefine a prima facie case every time it receives a complaint. To do so would undermine consistent treatment of complaints which is necessary for effective enforcement of Section 315(b). The Commission should be reminded that Congress intended the lowest unit charge provisions to be enforceable so that candidates may have greater access to the voters, thereby promoting the democratic electoral process.

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95. Tort and contract claims can accrue according to three possible dates: the date of defendant's wrongful act, the date of injury, or the date of discovery. The discovery rule tolls the statute of limitations until the plaintiff knows or should know enough facts. The discovery rule is commonly used in cases of products liability and professional malpractice. It is also more commonly used by consumers rather than commercial entities. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 986-987 (1985).

96. Declaratory Ruling, *supra* note 55, at 7521, n. 47.

97. *Id.* at 7514.

3. Sufficiency of the Evidence in Establishing a Prima Facie Case

The complainant has to show a factual basis for his complaint and cannot rely on general information from the 1990 Audit Report to support his claim.[98] However, the complainant can rely on *industry* information and statistical data on average rates to support his claim.[99]

These two assertions appear to be paradoxical for two reasons. First, industry information and statistical data are also general information used by the industry. Industry information and data do not necessarily reflect the rates of the violating station. For example, the industry average rate may be $50 for the lowest unit charge while the violating station's lowest unit charge may actually be $75. Statistical data and industry information do not address the specific violating station any more than the 1990 Audit Report information may address the specific violating station. Second, the findings of the 1990 Audit Report resulted from a Commission investigation whereas the information/statistical data from the industry are not the result of independent investigation.

It appears the Commission is placing a higher value on industry and statistical data than its own data when determining the sufficiency of the evidence. If this is so, the Commission may need to reevaluate whether the 1990 Audit Report was to aid the Commission in its enforcement of Section 315(b) if the data contained therein cannot be used to establish a prima facie case.[100]

4. Alternative Dispute Resolution

The Commission permits the parties to use Alternative Dispute Resolution (ADR) as a method of resolving the complaint.[101] ADR may be efficient for expeditious complaint handling, but this may not be enough of an incentive for candidates and stations to use this method.

98. *Id.* at 7521, n. 47.

99. *Id.*

100. If a complainant cannot use the data from the 1990 Audit Report to establish a prima facie case, another issue is whether the Commission can use the same information to initiate investigations against non-audited stations.

101. Declaratory Ruling, *supra* note 55, at 7513. The other method is evaluation and disposition by the Mass Media Bureau.

Under ADR, the parties' settlement agreement is not final. It is subject to the Commission's full scope of review which allows the Commission to reject the settlement and substitute its own decision.[102] Until the Commission actually reviews a number of ADR settlement agreements, candidates and violating stations lack any guidance or standards on what the Commission may consider as an acceptable settlement agreement. Thus, candidates and violating stations may feel reluctant to use ADR as an enforcement method for lowest unit charge violations.

Even if the parties submit to ADR, the Commission retains jurisdiction over sanctions for Section 315(b) violations.[103] Thus, in addition to the terms of the settlement agreement, the Commission may order additional penalties such as forfeitures, short term license renewal, or even license revocation. However, the Commission states that given the substantial demand on agency resources which Section 315(b) cases may create (in reality has created), the Commission would look favorably upon settlement in determining whether additional sanctions are warranted.[104] It appears that the Commission may give deference to settlement agreements rather than imposing its own sanctions.

This may allow broadcasters to use ADR to circumvent the lowest unit charge provisions. How? A station may violate the lowest unit charge and agree to settle with the complaining candidate. The settlement agreement probably will not provide deterrence measures for future violations. Realistically, violating stations are not going to agree to punitive measures in a settlement agreement. They certainly are not going to agree to license revocation, even if there are flagrant violations of the lowest unit charge. Thus, the settlement agreements allow the parties to determine their own level of compliance with the lowest unit charge provision.

This is contrary to the congressional intent of Section

102. FCC Seminar on Political Broadcasting (FCC broadcast, Feb. 25, 1992) (statement of Milton Gross, Chief of Political Programming Branch, Mass Media Bureau, FCC).

103. FCC Seminar on Political Broadcasting (FCC broadcast, Feb. 25, 1992) (statement of Robert Pettit, General Counsel, FCC). *See also* Declaratory Ruling, *supra* note 55, at 7514.

104. Declaratory Ruling, *supra* note 55, at 7521 n.52.

315(b). Congress has given the *Commission*, not the parties, the authority to enforce the lowest unit charge provision. If the settlement agreement circumvents the legislative intent of Section 315(b), then the process through which that agreement is achieved may also circumvent the lowest unit charge provision. When the lowest unit charge provision is bypassed by an ADR settlement agreement, it undermines that which the lowest unit charge provision has sought to protect: the candidates' access to voters, and ultimately the maintenance of the democratic electoral process.

Whether this evasion of the lowest unit charge provision will occur depends on the number of cases and the type of circumstances the Commission will defer to ADR settlements rather than imposing additional sanctions.

5. Miscellaneous

The complaint procedure also raises other issues such as 1) whether the ADR decision is viewed as an agency decision or limited to a decision between the parties; 2) if the agency adopts the decision, will the ADR be subject to the same scope of judicial review as other agency decisions; and 3) will the Commission, the courts, or both have jurisdiction to enforce ADR decisions.

IV. The Economic Realities of the Lowest Unit Charge Provision

There are four economic realities that candidates and broadcasters face when lowest unit charge violations occur:

1. The Commission will scrutinize the industry sales practices and will not sanction those sales practices that frustrate the congressional intent of Section 315(b)(1).
2. Lowest unit charge violations may result in costly litigation before the courts and the Commission.
3. Even if litigation can be avoided, lowest unit charge violations may result in unanticipated settlements and rebates.
4. Regardless of the outcome of litigation, settlements or rebates, lowest unit charge violations may still result in the Commission imposing substantial forfeitures, and in some instances, license revocation.

A. *Industry Sales Practices*

Candidates and broadcasters should be apprised that certain industry sales techniques and practices are not legitimate sales practices for political advertising. The Commission declared in its 1990 Audit Report and reaffirmed in the 1992 Report and Order that failure to disclose and negotiate commercial advertisers' rates and discount packages, failure to inform candidates of make goods, the creation of higher priced fixed political rates, and incomplete or disorganized political files are industry sales practices that "frustrate the intent of Congress as reflected in . . . Section 315(b)."[105] Therefore, these sales practices violate the lowest unit charge provision, and the Commission will not sanction these sales practices in its interpretation and enforcement of the lowest unit charge provision.

1. Failure to Disclose

The 1990 Audit Report indicated that candidates were being steered toward the higher-priced, non-preemptible rates because stations failed to disclose "the realities of preemptibility" to political candidates.[106] Very often political rate cards listed two rates: 1) a low-priced preemptible rate that has little chance of airing; and 2) a substantially higher non-preemptible rate that is certain to air.[107] However, the station also may offer an intermediate preemptible rate that is cheaper than the non-preemptible rate, has a high probability of airing, and is the prevailing rate used by commercial advertisers.[108] The intermediate preemptible rate would not be included on the rate card or made known to the candidate.[109]

A candidate who is not familiar with this type of sales technique or does not employ a media buyer may opt for the higher non-preemptible rate (certain to air) without considering the lower intermediate preemptible rate (high probability of airing) in his purchasing decision.[110]

105. 1990 Audit Report, *supra* note 48, at 116-17, 1990 FCC LEXIS 4700, at *13; Report and Order, *supra* note 58, at 687-92.

106. 1990 Audit Report, *supra* note 48, at 115, 1990 FCC LEXIS 4700, at *13.

107. *Id.*

108. *Id.*

109. *Id.* at 115-116, 1990 FCC LEXIS 4700, at *14.

110. *Id.* at 116, 1990 FCC LEXIS 4700, at *15.

2. Failure to Negotiate

It is common practice for broadcast sales representatives to negotiate rates with commercial advertisers. This negotiation process usually results in lower rates by offering special discount packages to the commercial advertiser to meet his individual needs.[111] The 1990 Audit Report indicated that sales representatives generally do not negotiate rates with political candidates.[112] Unlike the commercial advertisers, stations did not offer lower rates via special discount packages to the candidates.[113] Thus, candidates were not treated on par with the station's most favored commercial advertisers with regards to rates and station sales practices.

3. Failure to Inform Candidates of "Make Goods"

The Commission reported that many times neither the political rate card nor the sales representative informed the candidate about the availability of make goods prior to an election.[114] The Commission stated that if candidates knew about make goods, "this would greatly enhance the value of preemptible time to candidates by alleviating some of the fear that their advertising would not be broadcast before the election."[115] Failure to inform the candidates about make goods undermines the Commission's policy requiring stations that offer timely make goods to commercial advertisers must also offer timely make goods to candidates before election day.[116]

4. Creation of Higher Priced Fixed Political Rates

Another sales practice that violates Section 315(b)(1) is the creation of higher priced fixed political rates for spots adjacent

111. *Id.* at 116, 1990 FCC LEXIS 4700, at *14.

112. *Id.* at 116, 1990 FCC LEXIS 4700, at *15.

113. The political broadcast rules specifically state: "*All discount privileges* otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates." Broadcasts by Candidates for Public Office, 47 C.F.R. § 73.1940(b) (1991) (emphasis added).

114. 1990 Audit Report, *supra* note 48, at 116, 1990 FCC LEXIS 4700, at *16.

115. *Id.* at 116, 1990 FCC LEXIS 4700, at *15. *See also* Report and Order, *supra* note 58, at 205.

116. Report and Order, *supra* note 58, at 696. The Commission's policies on make goods "comport with Congress' intent to place candidates on par with a station's most-favored commercial advertiser." *Id.*.

to newscasts.[117] Stations that exclude political advertising from their newscasts[118] often create adjacent to their newscasts a premium-priced, fixed-position class of time that is sold only to political candidates.[119]

The Commission prohibits the creation of this type of class of time because "a station cannot create a special class of non-preemptible time that it knows only candidates will purchase while at the same time offering a less expensive 'preemptible' class to commercial advertisers that in reality offers virtually the same benefits as the higher priced class of time."[120] The premium-priced, candidates-only classes of time create a higher political rate. This contravenes the legislative intent of Section 315(b) to limit the costs of campaigning for public office.

5. Incomplete or Disorganized Political Files

Although the political programming laws require stations to maintain a *complete* political file,[121] some stations have been derelict in meeting this obligation. The 1990 Audit Report stated that many of the political files were either incomplete or so disorganized that candidates could not "ascertain requisite information for equal opportunity purposes."[122] Thus, a candidate inspecting the political file may not be able to ascertain the particular rates that were offered to other candidates to prevent rate discrimination. 47 C.F.R. § 73.1940(b) prohibits rate discrimination in calculating the lowest unit charge.

The improper maintenance of political files also violates the rules for license renewal requiring proper maintenance of the public inspection file.[123] One may argue that if the political file is

117. 1990 Audit Report, *supra* note 48, at 116, 1990 FCC LEXIS 4700, at *16-*17.

118. Stations can refuse to sell spots within a newscast to political candidates. Commission Policy in Enforcing Section 312(a)(7) of the Communications Act, Report and Order, 68 F.C.C.2d 1079, 1091 (1978). *See also* Anthony R. Martin-Trigona, Letter, 68 F.C.C.2d 1551 (1977).

119. 1990 Audit Report, *supra* note 48, at 116, 1990 FCC LEXIS, at *16; Report and Order, *supra* note 58, at 201.

The price of the spots within the newscasts that are available only to commercial advertisers usually are lower than the candidate-only class of time adjacent to the newscasts. *Id.*

120. Report and Order, *supra* note 58, at 692.

121. 47 C.F.R. §§ 73.1940(d), 76.205(d) (1990).

122. 1990 Audit Report, *supra* note 48, at 116, 1990 FCC LEXIS 4700, at *17.

123. 47 C.F.R. § 73.3526(a)(4) (1990).

incomplete or not properly maintained, there is a presumption that the station failed to follow both the political file rule and the license renewal requirement for maintaining such files. If the station does not satisfy the political file requirement, how does the Commission justify renewing the station's license without undermining its license renewal requirements? Furthermore, if the proper maintenance of the political file is so crucial to candidates being treated on par with commercial advertisers,[124] how can the Commission justify such a license renewal without undermining the legislative goal of a fair democratic electoral process?

Improper maintenance of the political file should subject a station to more than monetary forfeiture. In accordance with the congressional directive to maintain the integrity of the electoral process, improper maintenance of the political file should suggest serious implications in the renewal of a station's license.

The aforementioned sales practices contravene the lowest unit charge provision because they fail to treat candidates on par with the most favored commercial advertiser. In some instances, they restrict candidates' access to the voters and increase the cost of campaigning for public office. Therefore, these sales practices contribute to the erosion of the democratic electoral process.

B. *Broadcasters' Responses*

Many broadcasters view the political programming rules, especially those pertaining to lowest unit charge obligations as "confusing," "inconsistent," and "too broad."[125] It is instructive that the broadcasters did not apply these labels until after the release of the 1990 Audit Report in which particular sales practices advantageous to the broadcasting industry were not sanctioned. The following are the views of three organizations in the broadcasting industry.[126] They are a fair representation of

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124. In the 1990 Audit Report, the Commission emphasized the importance of proper maintenance of the political file. 1990 Audit Report, *supra* note 48, at 116, 1990 FCC LEXIS 4700, at *17.

125. NAB Comments, *supra* note 53, at 3. *See also* Doug Halonen, *More Stations Face Suits Over Political Ads*, ELECTRONIC MEDIA, Sept. 16, 1991, at 1; Craig J. Blakely, *Monday Memo*, BROADCASTING, Apr. 1, 1991 at 22; *FCC Seeking Way Out of 'Lowest Unit Charge' Confusion*, BROADCASTING, June 17, 1991 at 21.

126. The author selected the three organizations based on their broad representa-

the industry reaction.

1. National Association of Broadcasters

The National Association of Broadcasters (NAB) considers the 1990 Audit Report guidelines as so broad in scope that it "defeat[ed] many broadcasters' good faith efforts at implementation."[127] Rather than questioning the legitimacy of the industry sales practices as they apply to political advertising, the NAB faults the Commission for "fashion[ing] rules and policies which attempt to capture every nuance of operation of the broadcast advertising marketplace and, in doing so, make implementation a Herculean task."[128] It suggests that the Commission "adopt a pragmatic regulatory approach."[129] The NAB thinks this approach should be a Commission "policy statement and Primer, with minimal rules [and] amendments."[130] Thus, the NAB infers that the Commission should take a minimalist approach to implementing Section 315(b)(1).

It appears the NAB has taken a one-sided approach to defending the industry sales practices. Rather than explaining how the sales practices meet the congressional intent of Section 315(b)(1), the NAB tries to persuade the Commission to minimize their enforcement efforts in order to have political candidates meet the demands and sales practices of the industry. The NAB prefers the candidate to march to the beat of the marketplace drum with the industry directing the moves, despite the intent of Congress that the Commission interprets the lowest unit charge provision as a means of preserving a fair democratic electoral process.

2. American Family Broadcast Group, Inc.

The American Family Broadcast Group concludes that the Commission disregarded or simplified the "legitimate selling practices of the broadcast industry."[131] However, one must re-

tion of individual stations, their geographical diversity, and their involvement in pending litigation concerning lowest unit charge violations.

127. NAB Comments, *supra* note 53, at 2.
128. *Id.* at 9.
129. *Id.* at 10.
130. *Id.*
131. Comments of American Family Broadcast Group to the Notice of Proposed

member that legitimate is a relative term. Although broadcasting sales practices may be legitimate or acceptable in a marketplace driven by and for commercial advertising, these same sales practices may not be legitimate or acceptable in meeting the level of regulation that Congress intended for *political* advertising. Though Congress considered the diversity and commercial practices of a station important in calculating the lowest unit charge, Congress did not intend for those practices to restrict greater access to the voters or increase campaign costs.

In the legislative history of Section 315(b)(1), Congress established standards for reviewing station's sales practices. Those standards are: 1) the sales practice must treat the political candidate on par with the most favored commercial advertiser; 2) the sales practice cannot limit the candidate's access to voters; and 3) the sales practice cannot contribute to the high costs of campaigning for public office. If the sales practice is contrary to any of these standards, it contravenes the congressional intent of the lowest unit charge provision and cannot be sanctioned as a legitimate sales practice for political advertising. Broadcasters must remember that the lowest unit charge is a *statutory* political broadcast rate and is not driven by the industry practices and marketplace. The lowest unit rate is driven by a legislative standard that seeks to preserve the democratic electoral process of our government.

3. Westinghouse Broadcasting Group

The Westinghouse Broadcasting Group recognizes that political and commercial advertisers have different needs and purchasing practices.[132] It asserts that industry sales practices are tailored to meet these individual needs and can do so legitimately, so long as there is full disclosure to both political and commercial advertisers.[133]

Although Westinghouse supports full disclosure sales prac-

Rulemaking in MM Dkt No. 91-168, at 2 (Aug. 23, 1991) [hereinafter American Family Reply Comments].

132. Comments of The Westinghouse Broadcasting Group to the Notice of Proposed Rulemaking in MM Dkt No. 91-168, at 10 (Aug. 9, 1991) [hereinafter Westinghouse Comments].

133. *Id.*

tices, it assumes that full disclosure is not a problem because "the majority of political advertising is placed through sophisticated agencies familiar with station selling practices . . . .[;] full disclosure makes it possible for candidates and broadcasters to enter into fully informed advertising arrangements which may vary from those typically chosen by commercial advertisers."[134] However, Westinghouse does not acknowledge the candidate who does not have the financial resources to hire a sophisticated agency or a media buyer. These candidates may be left with the difficult task of trying to comprehend complex and fluctuating industry sales practices as well as their statutory rights as political candidates. Whether broadcasters will find it economically feasible or mandatory to educate these particular candidates is an issue that broadcasters will have to resolve in order to meet their affirmative disclosure obligations. Unless broadcasters are willing to educate all their political clients, it is dangerous to assume that *all* political candidates will receive full and comprehensible disclosure.

C. *Costly Litigation*

Lowest unit charge violations generally connote costly litigation for broadcasters and candidates. The pending and threatened lawsuits generated by the 1990 Audit Report illustrate the economic impact that *alleged*, not even proven, lowest unit charge violations have on broadcasters and candidates.

A Georgia group of politicians initiated the first suit in January 1991 against WXIA-TV in Atlanta.[135] Since then, twenty stations in Alabama and twenty-two stations in California have been sued.[136] Candidates have also threatened lawsuits against stations in eight other states.[137] The Georgia case was ultimately dismissed at the request of all parties.[138]

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134. *Id.* at 16.

135. *FCC Moves To Stem Lowest Unit Lawsuits*, BROADCASTING, Oct. 7, 1991, at 24.

136. *Id.*

137. Telephone Interview with Robert Kahn, Attorney at Barnes, Browning, Tanksley & Casurella (Mar. 6, 1992) (Mr. Barnes is the lead counsel for a group of law firms that represent political candidates claiming refunds from stations for overcharged campaign spots.)

138. Zell Miller for Governor v. Pacific & S. Co., Case No. 91-85-61 (11th Cir. 1992).

Complaints brought to the Commission may also end in litigation. As of March, 1992 seven complaints (five filed after the 1990 Audit Report) had been filed with the Mass Media Bureau for a determination.[139] In addition to filing complaints before the Commission and in courts, attorneys have filed motions, briefs, comments, and reply comments for the Declaratory Ruling as well as the Report and Order. Although the lawyers for the Kahn group, a group of law firms that represent political candidates claiming refunds from stations for overcharged campaign spots, work on a contingent fee basis, they estimate they have spent a substantial sum in two years to litigate the *alleged* lowest unit charge violations.[140]

If the lowest unit charge provision means costly litigation every election year, candidates may wonder if the lowest unit charge provision actually protects them from the escalating costs of campaigning for public office. If costly litigation is the price to pay for enforcing the provision, the provision may no longer be an effective tool to carry out the legislative intent of Congress.

D. Costly Settlements and Rebates

Broadcasters and candidates may seek settlement or rebates as an alternative to litigation. However, even settlement or rebates can be expensive for the broadcaster.

The following examples amply demonstrate this expense: Ten stations sued by the Kahn group settled for approximately $600,000 each.[141] At KRON Television in San Francisco, rebates for one week alone are estimated at $41,000.[142] WSB Television in Atlanta reportedly issued $150,000 in rebates.[143] KDFW Television in Dallas also issued $25,000 in rebates.[144] Such unanticipated rebates and settlements can have a substan-

139. Telephone Interview with Milton Gross, Chief of Political Programming Branch, Mass Media Bureau, FCC (Mar. 6, 1992).

140. Telephone Interview with Robert Kahn, Attorney for Barnes, Browning, Tanksley & Casurella (Mar. 6, 1992).

141. Doug Halonen, *More Stations Face Suits Over Political Ads*, ELECTRONIC MEDIA, Sept. 16, 1991, at 1.

142. Chronicle Publishing Company, Letter, 6 FCC Rcd. 7497, 7501-05 (1991) (Notice of Apparent Liability for KRON-TV).

143. Comments of Georgia Lawyers' Group to the Notice of Proposed Rulemaking in MM Dkt No. 91-168, at 16 (Aug. 9, 1991).

144. KDFW-TV, Letter, 6 FCC Rcd. 7491, 7492 (1991).

tial effect on a station's profits, especially in a recessionary economy.

These settlements and rebates are attempts to reimburse candidates for the station's failure to charge the lowest unit rate. However, they do not and cannot adequately compensate the candidate for limiting his access to voters *prior* to the election. When a station violates the lowest unit charge provision, it effectively reduces the number of opportunities that the candidate has to contact voters. For close political races, the broadcast rates a political candidate must pay can determine the outcome of an election. Settlements and rebates cannot compensate either the candidate for his loss of the election or the voters for the lost opportunity to hear the candidate. Settlements and rebates may placate the complaining parties but they do not redress the damage to the democratic electoral process.

E. Forfeitures

Broadcasters must also deal with the reality of forfeitures in addition to litigation costs, settlement, and rebates.

In December 1991, the Commission issued notices of apparent liability to several stations named in the 1990 Audit Report.[145] The forfeitures ranged from $1,500 to $25,000 for violations such as rate discrimination between candidates and failure to maintain political files.[146] Although the stations were not fined for failure to disclose, the Commission made it very clear that future incidents of failure to disclose may result in forfeitures.[147]

V. The Political Realities of the Lowest Unit Charge Provision

The turmoil surrounding the lowest unit charge provision has prompted Congress to question the effectiveness and adequacy of the existing lowest unit charge provision.[148] Legislation has been introduced to ensure that candidates receive the lowest

145. *See* Appendix B for a list of the stations, the Commission rulings, and specific forfeitures.

146. *Id.*

147. *Id.*

148. S. Rep. No. 59, 102d Cong., 1st Sess. 7 (1991); H.R. Rep. No. 340, 102d Cong., 1st Sess. 19 (1991).

unit charge and to clarify the original goal of Section 315(b) - "enhancing the information available to the electorate by reducing campaign costs."[149] The political survival of the lowest unit charge provision depends on the proposed statutory language in Senate bill, S-3, as amended by S-521, and H.R. 3750.[150]

A. S-3: Senate Election Ethics Act of 1991

In S-3, the lowest unit charge is treated as a benefit or an incentive for candidates to participate in the electoral process.[151] The purpose for the proposed change is to make "broadcast time more affordable . . . [and] help suppress rising election costs, while making participation in the system more attractive to candidates."[152]

Under S-3, Senate candidates who agree to the voluntary expenditure limitations and meet the eligibility requirements set forth in the bill[153] receive the following discounts on broadcast rates.

1. During the general election period, the rate shall not exceed "50 percent of the lowest unit rate available during that time period."[154]

2. During the 45-day period before the primary, the rate is the lowest unit rate as redefined in S-3.[155]

3. All other candidates, such as Senate candidates who do not meet the eligibility requirements or refuse to follow the voluntary spending limits, receive the lowest unit rate as defined under the current lowest unit charge provision, 47 U.S.C. § 315(b)(1).[156]

4. Eligible Senate candidates qualify for communication vouchers which are used to purchase one to five minute seg-

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149. S. REP. NO. 59, 102d Cong., 1st Sess. 7 (1991).

150. S. 3, 102d Cong., 1st Sess. (1991); S. 521, 102d Cong., 1st Sess., 137 CONG. REC. 6502 (1991); H.R. 3750, 102d Cong., 1st Sess. (1991).

151. S. REP. NO. 37, 102d Cong., 1st Sess. 17 (1991).

152. *Id.* at 18.

153. *Id.* at 15 (voluntary expenditure limitation table for Senate elections). Eligibility is based on the candidate raising private contributions equal to ten percent of the general election spending limit for that State.

154. *Id.*

155. *Id.* at 17 ("The bill defines lowest unit rate as the lowest unit charge for the same amount of time for the same time of day and day of week." *Id.*).

156. *Id.* at 17.

ments of broadcast time during the general election period.[157] Vouchers for major party candidates are worth twenty percent of the general election expenditure limit while minor party candidates' vouchers are worth ten percent of the limit.[158]

There are three major problems with the lowest unit charge provisions of S-3. First, the voucher system treats major and minor party candidates differently. All candidates must meet the same eligibility requirements, i.e., their direct, private campaign contributions must equal no more than 10 percent of the general election voluntary spending limit and 50 percent of such contributions must come from within the candidate's state.[159] However, the voucher system gives the major party candidate a larger rate reduction, 20 percent of the lowest unit rate, while the minor party receives only a 10 percent rate reduction. If both parties have to meet the same threshold amount for eligibility, both should enjoy equally in the benefits from meeting that requirement.

Second, the eligibility requirements may be more difficult for a minor party candidate to achieve than a major party candidate. Unlike the major party candidate, the minor party candidate does not have a political machine to canvass large private contributors within her state to make direct contributions to her campaign.

Third, there are two definitions for lowest unit charge as the rate pertains to eligible and non-eligible candidates. This may result in confusion in the calculation of the lowest unit rate, especially when a candidate moves from non-eligibility to eligibility status within the primary period. The two definitions also may result in rate discrimination between eligible and non-eligible candidates.

B. S-521: Campaign Advertising and Disclosure Act of 1991

The Senate approved S-3 as amended by S-521 on May 23, 1991. S-521 adds the following changes to S-521:

1. The word "class" is deleted from the lowest unit charge

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157. *Id.*

158. S. 3, 102d Cong., 1st Sess. § 101 (1991).

159. S. REP. NO. 37, 102d Cong., 1st Sess. 16. The private contributions must equal ten percent of the general election spending limitation. *See id.* at 15 (voluntary expenditure limits table).

provision in an effort to "prohibit[] broadcasters . . . from discriminating between political candidates and commercial advertisers that purchase advertising time during a specific program or time period."[160]

2. S-521 shortens the time period during which the lowest unit charge is available to candidates from the existing 45- and 60-day period to 30 days before a primary and 40 days before the general election.[161]

3. Stations are prohibited from preempting a candidate's advertisement that is "purchased and paid for,"[162] except when an entire program is preempted due to circumstances beyond the broadcaster's control.[163]

The Senate acknowledged in the Committee report that accompanies S-521 that,

> [T]he cost of air time is so high that it distorts the campaign process. It limits what the candidates pay and what the electorate hears. It makes it much tougher for a candidate to challenge an incumbent . . . . It forces candidates to spend [far less] . . . time and energy on the issues and far too much time on raising money from political action committees.[164]

When Congress enacted the lowest unit charge provision in 1972, the goal was to achieve greater access for the candidate so that she can inform voters. It was not Congress' intent for candidates to spend so much time on fundraising that the discussion of political issues became a secondary goal.

C. *H.R. 3750: House of Representatives Campaign Spending Limit and Election Reform Act of 1991*

H.R. 3750 is the House of Representatives version of S-3 and S-521. However, the bill does not include the fifty percent discount for eligible candidates.

D. *Current Status of Legislation*

The House approved H.R. 3750 on November 25, 1991 but inserted the text of H.R. 3750 in lieu of the S-3 text. The

160. S. REP. No. 59, 102d Cong., 1st Sess. 12 (1991).
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 5.

amended bill was returned to the Senate with the amended text. A House-Senate conference committee met in March 1992 to resolve the differences between the House and Senate versions of the bill.

The conference committee issued its report on April 3, 1992, amending the title of the bill to "Congressional Campaign Spending Limit and Election Reform Act of 1992."[165] The conference committee made minor revisions to the lowest unit charge provisions contained in S-3, as amended by S-521. The Committee deleted the provision that limited broadcast time, purchased with the communication vouchers, to one to five minute segments.[166] It adopted the shortened time period to which the lowest unit charge provision would apply and deleted "class of time" from the existing statutory language.[167] The Committee also provided eligible Senate candidates with an additional benefit by allowing these candidates to purchase broadcast time at fifty percent of the lowest unit rate 45 days before the general election.[168] Both the House and the Senate agreed to the conference report with little debate over the lowest unit charge provision.[169]

The President vetoed the bill on May 9, 1992 stating,

> I cannot accept legislation, like S.3, that contains spending limits or public subsidies, or fails to eliminate special interest PACs . . . . I am opposed to different rules for the House and Senate on matters of ethics and election reform. In several key respects, S.3 contains separate rules for House and Senate candidates, with no apparent justification other than political expediency.[170]

According to the President, S-3 continued the imbalance between challengers and incumbents and limited political speech protected by the First Amendment through its so-called "volun-

165. H.R. CONF. REP. NO. 487, 102d Cong., 2d Sess. (1992).

166. *Id.* at 60.

167. *Id.* at 26.

168. *Id.* at 26, 68.

169. 138 CONG. REC. S5826-66 (daily ed. April 30, 1992); 138 CONG. REC. H2505-29 (daily ed. April 9, 1992). (Much of the debate focused on the provisions concerning political action committees [hereinafter PACs], the public subsidizing congressional election campaigns, the incumbents' having advantages over challengers, and the voluntary spending limits.)

170. President's Message to the Senate Returning Without Approval the Congressional Campaign Spending Limit and Election Reform Act of 1992, 28 WEEKLY COMP. PRES. DOC. 822 (May 9, 1992).

tary" spending limits.[171] On May 13, 1992, the Senate failed to override the President's veto.[172]

Congress determined that the existing lowest unit charge provision is ineffective and inadequate because of broadcasters' ability to circumvent the political programming rules through sophisticated sales practices.[173] Although Congress acknowledged the problems associated with the lowest unit charge provision and identified the sources of the problems, Congress had no language in S-3, S-521, H.R. 3750, or the conference agreement that provided for enforcement of the lowest unit charge provision. It made cosmetic changes to the existing lowest unit provision by covering it with a benefit/incentive policy, shortening the time period of its availability for the candidate, and providing non-preemptibility rhetoric to appease the broadcasters. However, Congress failed to deal with the crux of the problem: lack of compliance or rigorous enforcement of the existing lowest unit charge provision.

Legislators claim they are concerned that special interest groups are dominating the electoral process by spending large sums of money on the election campaigns.[174] However, Congress did not provide any specific language in any of its legislation that enforced compliance with the lowest unit charge provision to circumvent these special interest groups.

In a recent letter to Commission Chairman Alfred Sikes, leaders of the House Commerce Committee and Telecommunications Subcommittee commended the Commission on the Report and Order it issued in 1992 to help stations and candidates understand their respective rights and obligations under the political programming laws.[175] They also stated that "vigorous enforcement" was crucial to the success of the Report and Order and urged the Commission to conduct audits as a means of compliance and enforcement.[176] Despite the commendation and the acknowledgement for the need of vigorous enforcement, the low-

171. *Id.* at 822, 823.

172. 138 CONG. REC. S6586 (daily ed. May 13, 1992).

173. S. REP. NO. 59, 102d Cong., 1st Sess. 5 (1991); H.R. REP. NO. 340, 102d Cong., 1st Sess. 20 (1991).

174. H.R. REP. NO. 340, 102d Cong., 1st Sess. 8 (1991).

175. COMM. DAILY, Feb. 20, 1992, at 8 (discussion of Report and Order, *supra* note 58, at 189 (1992)).

176. *Id.*

est unit charge legislation did not have any "teeth" when it came to enforcement.

If the proposed amendments to the lowest unit charge provisions were to preserve a fair democratic electoral process, then Congress should have appropriated additional funds to enable the Commission to vigorously enforce the provision or should have provided specific penalties in the legislation as a means of enforcement.

VI. The First Amendment and the Lowest Unit Charge Provision

Our democratic form of government is founded on the basic principle of self-governance.[177] Framers of the Bill of Rights recognized that self-governance requires citizens to participate effectively in their government by making informed choices on political issues and political representation.

> The right of electing the members of government, constitutes . . . the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of *examining* and *discussing* these merits and demerits of the candidates respectively.[178]

In order to examine and discuss these merits and demerits, citizens must have access to or the ability to receive information on political issues and representation. The First Amendment right of free speech and press[179] protects the access to as well as the ability to receive this information. "[A] central mission of the first amendment is to ensure that speech necessary for the education of the public regarding political and other public issues is spoken and that this information reaches the public."[180]

Political speech is speech that informs and educates citizens on political issues and political representation. The United

177. Alexander Meiklejohn, Free Speech and its Relation to Self-Government 15 (1948).

178. New York Times v. Sullivan, 376 U.S. 254, 275 n. 15 (1964) (quoting James Madison in his Report on the Virginia Resolution attacking the Sedition Act of 1798) (emphasis added).

179. U.S. Const. amend. I.

180. Note, *Reexamining the Reasonable Access and Equal Time Provisions of the Federal Communications Act: Can These Provisions Stand if the Fairness Doctrine Falls?*, 74 Geo. L.J. 1491, 1504 (1986) (bracketed language in original).

States Supreme Court recognized the paramount importance of political speech to the democratic electoral process, and has granted political speech broad protection under the First Amendment.

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'[181]

Because political speech is so vital to our democratic form of government, courts have specifically protected political speech from interference by broadcasters.[182] The United States Supreme Court has preserved citizens' right to political speech, despite the scarcities operating within the electronic media, by granting citizens a "*right* to have the [broadcast] medium function consistently with the ends and purposes of the First Amendment."[183]

> It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, *political*, esthetic, moral, and other ideas and experiences which is crucial . . . . That right may not constitutionally be abridged. . . .[184]

This right is so paramount to the functioning and preservation of the democratic process that the Court maintains that, "[i]t is the right of the viewers and listeners, not the right of the

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181. Buckley v. Valeo, 424 U.S. 1, 14 (1976) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)). *See also* First Nat'l Bank v. Bellotti, 434 U.S. 765, 777 ("[S]peech concerning political issues is indispensable to decisionmaking in a democracy because of its inherent worth in terms of its capacity for informing the public."); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (" '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' " (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

182. The congressional intent in the passage of the 1927 Radio Act was to balance private and public control of the airwaves.

> The essence of this compromise was the view that broadcasting should remain under private control in general but that certain uses of the airways, *particularly political ones*, were too central to democratic values to be left to the whim of the private broadcaster. Accordingly, the Radio Act imposed a specific set of restraints upon broadcasters.

National Ass'n of Broadcasters v. FCC, 740 F.2d 1190, 1199 (1984) (emphasis added).

183. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added).

184. *Id.*

broadcasters, which is paramount."[185]

The United States Supreme Court recognized a parallel relationship between the First Amendment and Section 315(b) as the respective protector and facilitator of political speech through which the democratic process is achieved. In *Farmers Educational & Cooperative Union v. WDAY, Inc.*, the Court determined that the essential meaning of Section 315 is "to *facilitate* . . .[discussion of political issues by candidates] over the radio and television."[186] Although Congress intended to use the electronic media as a means of communicating political ideas to the public, the Court explained that this does not give the media the right to limit political speech by censoring it.[187] The Court determined that the broadcaster's censorship of political speech undermined the purpose of Section 315 - "full and unrestricted discussion of political issues by legally qualified candidates."[188]

The Court also relied indirectly on the First Amendment to prohibit the censorship of political speech. The Court examined the legislative history of the Federal Communications Act, found a congressional intent against broadcasters and the Commission censoring political broadcasters, and noted that this intent was based on "this country's tradition of free expression."[189]

The lowest unit charge provision is a statutory provision that supports the First Amendment protection of political speech. The lowest unit charge provision and the First Amendment are vehicles that drive toward preserving the democratic electoral process. The lowest unit charge provision is also a facilitator for getting political speech to voters by securing candidates access to voters through low political broadcast rates.[190] The Commission's role is to ensure candidates media access by circumventing industry sales practices that raise prices and contribute to the escalating costs of campaigning for public office. Thus, the Commission has a statutory obligation under the lowest unit charge provision and a First Amendment obligation to

185. *Id. See also* Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997, 3010 (1990).
186. Farmers Educ. & Coop. Union v. WDAY, 360 U.S. 525, 534 (1959) (emphasis added).
187. *Id.* at 529.
188. *Id.* at 529.
189. *Id.* at 528-530.
190. Low is a relative term which does not necessarily mean inexpensive. Low is defined here in relation to the higher rates paid by commercial advertisers.

protect access to political speech. Broadcasters have statutory and First Amendment obligations to *provide*, not limit, access to political speech. The proper operation of the lowest unit charge restricts broadcasters within the economic marketplace for the purpose of preserving the marketplace of ideas so vital to our democratic form of government.

VII. CONCLUSION

The statutory language, the Commission's regulations, and the legislative history clearly define the lowest unit charge provision and its purpose. It established a statutory political broadcast rate designed to give legally qualified candidates greater access to voters via the electronic media. It allows political speech to reach voters and, in turn, enables voters to make informed choices about political issues and representation.

Over the past twenty years, the Commission has interpreted, informed, and reminded broadcasters and candidates of their respective rights and obligations under the lowest unit charge provision. The 1988 Public Notice, the 1990 Political Programming Audit, the Report and Order codifying the Commission's political programming policies, and the Declaratory Ruling are just a few examples of the Commission performing this herculean task.

Despite these concerted efforts, the 1990 Political Programming Audit Report identified certain industry sales practices that circumvented the lowest unit charge provision and thwarted the intent of Congress to provide a fair democratic electoral process. After the 1990 Audit Report, broadcasters had to face up to economic reality. The Commission would not sanction such sales practices as legitimate when applied to political advertising.

In order to make the lowest unit charge provision effective, the Commission should not interpret the provision using commercial sales practices. Broadcasters design their sales practices for the world of commercial advertising subject to the economic fluctuations of the marketplace. Congress intended that the lowest unit charge provision would establish a *statutory political* broadcast rate to operate in a political marketplace that promotes our democratic form of government. The provision exists primarily to give voters access to political speech so they can make informed choices on political issues and representation.

This access to information forms the basis of self-governance and democracy. When broadcasters circumvent the lowest unit charge through marketplace tactics, they deny the kind of access that is affordable to *all* legally qualified candidates. This frustrates the democratic electoral process and imposes the will of the marketplace rather than the will of the voters upon it.

Broadcasters, the Commission and Congress must reevaluate their roles in carrying out the lowest unit charge if the lowest unit charge provision is to successfully promote and maintain the democratic electoral process. Broadcasters may have to abandon commercial sales practices or develop special sales practices to handle political advertising. Political advertising rates may have to be a low uniform rate so that *all* candidates can afford access to the voters via the electronic media.

The Commission will have to enforce the provision vigorously by implementing sufficient enforcement procedures that could include periodic audits. The 1990 Audit Report proved to be an effective method for raising the consciousness of broadcasters, candidates, and Congress with respect to the lowest unit charge provision. The Commission may want to combine audits with sufficient complaint procedures that do not allow individual stations to determine their own level of compliance.

Congress should provide legislation that strengthens the lowest unit charge provision with either additional funds for Commission enforcement or strict penalties for non-compliance. Congress should avoid restructuring the lowest unit charge as incentives or benefits because such an action would make the rate available only to certain candidates and not to others.

While the lowest unit charge provision may not ever operate easily, it is a vehicle, a facilitator, and a protector of the most vital principle within our form of government - a fair democratic electoral process.

APPENDIX A
STATIONS AUDITED BY THE FEDERAL COMMUNICATIONS COMMISSION FOR COMPLIANCE WITH POLITICAL PROGRAMMING LAWS[191]

July 16, 1990

STATION	LICENSEE/OWNER
Cincinnati, Ohio	
WCPO-TV (CBS)	Scripps Howard Broadcasting Company
WKRC-TV (ABC)	Great American Television and Radio
WLWT-TV (NBC)	Multimedia Entertainment, Inc.
WIII-TV (Indep.)	Abry Communications
WCKY-AM Radio	Federated Media
WWNK-FM Radio	Booth American Company
Dallas-Forth Worth, Texas	
KDFW-TV (CBS)	Times Mirror
KXAS-TV (NBC)	LIN Broadcasting Stations
WFAA-TV (ABC)	A. H. Belo Corporation
KTXA-TV (Indep.)	TVX Broadcast Group, Inc.
KRLD-AM Radio	Metropolitan Broadcasting Corporation of Dallas
KPLX-FM Radio	Susquehanna Radio Corporation
Philadelphia, Pennsylvania	
KYW-TV (NBC)	Westinghouse Broadcasting, Inc.
WCAU-TV (CBS)	CBS, Inc.
WPVI-TV (ABC)	Capital Cities/ABC, Inc.
WGBS-TV (Indep.)	Combined Broadcasting, Inc.
WPEN-AM Radio	Greater Philadelphia Radio, Inc.
WWDB-FM Radio	Panache Broadcasting
Portland, Oregon	
KATU-TV (ABC)	Fisher Companies, Inc.
KGW-TV (NBC)	King Broadcasting Company
KOIN-TV (CBS)	Lee Enterprises
KPTV-TV (Indep.)	Oregon Television, Inc.
KWJJ-AM Radio	Roy H. Park Broadcasting
KKSN-FM Radio	Heritage Media Corporation
San Francisco, California	
KGO-TV (ABC)	KGO-TV, Inc.
KRON-TV (NBC)	Chronicle Broadcasting Company
KTVU-TV (Fox)	KTVU, Inc.
KOFY-TV (Indep.)	Pacific FM, Inc.
KNBR-AM Radio	NBC
KABL-FM Radio	Shamrock Broadcasting

191. FCC Conducts Political Programming Audit, 1990 FCC LEXIS 3703 (1990).

Appendix B
Rulings by the Federal Communications Commission: Audited Stations Cited for Violation of Political Programming Laws

STATION:	KDFW-TV
CITY:	Dallas, Texas
VIOLATION:	Rate violations included station offering only two rates to candidates while offering three rates to commercial advertisers. Failure to disclose involved publishing a limited rate card that does not have all the rate options that are available to commercial advertisers.
COMMISSION ACTION:	Notice of Apparent Liability/Forfeiture - $25,000 for rate violations. Cautioned station to modify sales practices that fail to disclose rate information to political candidates.
SOURCE:	Letter to KDFW-TV, 6 FCC Rcd. 7491 (1991).

STATION:	KGO-TV
CITY:	San Francisco
VIOLATION:	Station had policy that appeared to impose limit on amount of a federal candidate could purchase which violated "reasonable access" rule under 47 U.S.C. § 312(a). Failure to disclose different preemptible rates made available to commercial advertisers. Commission concluded that failure to disclose did not warrant forfeiture for same reasons cited in KRON-TV.
COMMISSION ACTION:	Cautionary letter to revise conduct as pertains to reasonable access for federal candidates and failure to disclose. No penalties assessed because no evidence that political candidate requested and refused a particular class of time.
SOURCE:	Letter to KGO-TV, Inc., 6 FCC Rcd. 7507 (1991).

STATION: KPLX-FM Radio
CITY: Forth Worth, Texas
VIOLATION: Rate violations included selling bonus spots in overnight to commercial advertisers and selling ten second billboard spots in traffic reports to commercial advertisers. Station did not offer the these spots to political candidates.
COMMISSION ACTION: Commission gave station an admonishment because of the "de minimis" nature of the violation and the value of the bonus spots would not have significantly altered the lowest unit rate.
SOURCE: Letter to Susquehanna Radio Corp., 1991 FCC Lexis 6659 (1991).

STATION: KRLD-AM Radio
CITY: Dallas, Texas
VIOLATION: Failure to maintain complete political files.
COMMISSION ACTION: Notice of Apparent Liability/Forfeiture - $3,750
SOURCE: Letter to Metropolitan Broadcasting Corporation, 6 FCC Rcd. 7524 (1991).

STATION: KRON-TV
CITY: San Francisco, California
VIOLATION: Rate violations (rate increases after pre-election period); rate discrimination between candidates; make goods not airing prior to election. Failure to disclose noted, but station not penalized because prior to the Audit Report, the Commission had not articulated affirmative duty to disclose.
COMMISSION ACTION: Notice of Apparent Liability/Forfeiture - $25,000. Told to modify sales practices that fail to disclose rates offered to commercial advertisers.
SOURCE: Letter to Chronicle Publishing Company, 6 FCC Rcd. 7497 (1991).

STATION:	KTXA-TV
CITY:	Arlington, Texas
VIOLATION:	Failure to maintain accurate political file and failure to disclose to candidates "preferential preemption treatment" available to commercial advertisers.
COMMISSION ACTION:	Notice of Apparent Liability/Forfeiture - $7,500 Cautioned station on failing to disclose to candidates information on discount privileges available to commercial advertisers.
SOURCE:	Letter to TVX Broadcast Group, Inc., 6 FCC Rcd. 7494 (1991).

STATION:	WSTR-TV
CITY:	Cincinnati, Ohio
VIOLATION:	Failure to maintain accurate political file and failure to disclose to candidates larger daypart rotations, the station's preemption and make good policies.
COMMISSION ACTION:	Notice of Apparent Liability/Forfeiture - $1,500 for failure to maintain accurate political file. Told station to modify particular selling practices cited above.
SOURCE:	Letter to WSTR-TV, Inc., 6 FCC Rcd. 7522 (1991).

The Problem of International Accounting Rates: The European Commission Steps In

M. Veronica Pastor*

I. WHY YOUR EUROPEAN FRIENDS NEVER CALL YOU

A telephone call from a European country to the United

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States typically costs significantly more than the same call in the opposite direction.[1] The reason for this discrepancy is both simple and perverse. A call between the United States and a foreign country involves three different telecommunications players: the local phone company in the United States, the caller's chosen long-distance carrier, and, in most cases, the government-owned telephone monopoly at the other end of the line. The fees that American long distance carriers and their foreign counterparts charge to provide connection with each other - known as accounting rates - are agreed upon in private international negotiations. According to the regulations of the International Telecommunications Union, telephone companies are to establish accounting rates by mutual agreement, taking into account relevant cost trends.[2] The past five years have seen a dramatic decrease in the actual cost of international telephone calls due to advances in technology[3] and an increasing divorce of cost from distance. This cost reduction, however, has not affected European accounting rates and consumer prices, known as collection rates, both of which have remained quite high.[4]

Foreign telecommunications administrations enjoy a bargaining advantage given the peculiar structure of the U.S. market: because the American market for voice telephony is open to competition, it is in each American carrier's best interest to offer to pay higher prices for additional concessions.[5] Moreover, since U.S. carriers are under pressure to lower their collection rates[6] in order to attract and keep subscribers, they generally

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1. The average call from the U.S. to a foreign country cost $1.20 per minute in 1988. The average price of a call to the U.S. from abroad was $1.70. Albert H. Kramer and Robert F. Aldrich, *Developments in the Long Distance Marketplace*, *in* TELECOMMUNICATIONS POLICY AND REGULATION 1991, 7, 41 n.20 (Practicising Law Institute, 1991).

2. Art. 6.2.1, ITU Reg., Final Act of the World Admin. Telegraph and Telephone Conf., Melbourne, Australia (Nov. 28 to Dec. 9, 1988).

3. The cost of international communications has dropped by 50% since 1988. *See, e.g.*, Barton Crockett, *Undersea Fiber Cables to Herald Low International Rates*, NETWORK WORLD, Aug. 28, 1989, at 6, *available in* LEXIS, Cmpcom library, NWW file.

4. Regulation of International Accounting Rates, Summary of Further Notice of Proposed Rule Making, 56 Fed. Reg. 25,400, 25,401 (1991).

5. *See, e.g.*, Charles Mason, *FCC Rejects MCI Service to Spain*, TELEPHONY, Sept. 4, 1989, at 12, *available in* LEXIS, Cmpcom library, Tphny file.

6. In fact, the average call from the United States to a foreign country is priced below the accounting rate. Kramer & Aldrich, *supra* note 1, at 41 n.20.

cannot pass the additional costs on to consumers.

European telecommunications administrations do not suffer from these constraints. Because they enjoy voice monopolies, they can dictate the price to be paid by their subscribers independently of the actual cost of completing the call and are therefore under no pressure to reduce accounting rates and pass savings on to customers. The U.S. carriers have fewer bargaining chips, and the foreign carriers are all too willing to engage in "whipsawing"[7] - that is, playing American competitors against each other to extract economic advantages out of them.[8]

European phone users are forced to pay the high rates charged by their national phone companies for international calls because they do not have the option of defecting to a lower-priced carrier. This inequality in bargaining power has resulted in a serious trade imbalance between the United States and Europe, both in terms of money and volume of calls. The two problems are closely related, as both U.S. carriers and European consumers find themselves in inferior bargaining positions.

It is elementary economics that the demand for a good or service rises as the price declines. Because their phone rates are so high, Europeans are much more reluctant to make intercontinental calls than Americans. The lower call volume was responsible, in part, for a $3 billion imbalance in 1990 in the net settlement payments for international message telephone service from U.S. carriers to foreign communications administrations.[9] Since they compete with each other for customers, American phone companies must pass cost savings on to consumers in the form of lower prices to maintain their market share. By contrast, European monopolies can price their service independently

7. *See* Mason, *supra* note 5, at 12.

8. *See, e.g.*, Uniform Settlement Rates on Parallel International Communications Routes, Memorandum Opinion and Notice of Proposed Rulemaking, 66 F.C.C.2d 359 (1977). "Foreign correspondents can utilize their monopoly status to play one carrier against the other carriers, and thus possibly gain significant concessions and benefits from the U.S. international carriers to the detriment of the American ratepayer." *Id.* at 360 (stating the FCC's policy to require uniform settlement agreements between IRCs and foreign carriers).

9. The $3 billion figure comes from KENNETH B. STANLEY, A REVIEW OF IMTS ACCOUNTING RATES FROM 1985 TO 1991 (1992), 1992 FCC LEXIS 840, at *2. Mr. Stanley wrote this review as a member of the Common Carrier Bureau, FCC.

of cost. There are some signs, however, that this situation may be on the verge of change.

In 1989, the Federal Communications Commission brought the trade imbalance and its deleterious effects on American long-distance carriers to the attention of the public. Under the direction of Chairman Alfred Sikes, the Commission has begun investigating international accounting rates and the reason for the great directional discrepancy. In an effort to find a solution to this problem, the Commission has indicated that if U.S. carriers are unable to negotiate lower, cost-based, accounting rates, it may be forced to intervene more directly.[10] In an attempt to avoid reaching this point of positive intervention, the Commission has ordered American carriers to negotiate "lower, more cost-based accounting rates with their foreign correspondents, particularly focusing on Asia and Europe."[11]

At roughly the same time, in its 1987 Green Paper on Telecommunications, the European Commission began to question Post, Telegraph and Telecommunications (PTT) monopolies and to move towards liberalization and competition in this area.[12] A series of Directives have followed the Green Paper, limiting the scope of the PTT monopolies and opening most telecommunications services to competition.[13] The means used by the Commission to implement its decision - Article 90 of the Treaty Establishing the European Economic Community (EEC Treaty), which allows issuance of Directives without consultation with the European Council - has been sanctioned by the European Court of Justice.[14]

This Comment argues that the FCC has an unsuspected

10. Regulation of International Accounting Rates, Report and Order, 6 FCC Rcd. 3552, 3554 (1991) [hereinafter Report and Order].

11. Regulation of International Accounting Rates, Summary of Further Notice of Proposed Rule Making, 56 Fed. Reg. 25,400, 25,402 (1991). *See* Report and Order, *supra* note 10, at 3556.

12. COMMISSION OF THE EUROPEAN COMMUNITIES, TOWARDS A DYNAMIC EUROPEAN COMMUNITY: GREEN PAPER ON THE DEVELOPMENT OF THE COMMON MARKET FOR TELECOMMUNICATIONS SERVICES AND EQUIPMENT, COM(87) 290 (1987) [hereinafter GREEN PAPER].

13. Commission Directive 88/301 on Competition in the Markets in Telecommunications Terminal Equipment, 1988 O.J. (L 131) 73 [hereinafter Equipment Directive]; Commission Directive 90/388 on Competition in the Markets for Telecommunications Services, 1990 O.J. (L 192) 10 [hereinafter Services Directive].

14. *See* Case C-202/88, France v. Commission, 5 C.M.L.R. 552 (1991).

ally in the Directorate General for Competition of the European Commission (DG IV), and that the actions of the Directorate, together with the natural consequences of the introduction of competition, will eliminate the international accounting rates problem and be the driving force towards more cost-based pricing of international calls, lower accounting rates, and the consequent reduction of the trade imbalance in calls.

The first section of this Comment discusses the European stance towards competition policy, and the increasing willingness of the European Commission to intrude into areas, such as telecommunications, that were formerly reserved to the Member States. The second section examines the current sources of competition to the European voice monopolists, and the reasons why they constitute a real threat. The third section looks at the specific cases of Great Britain and Germany, where competition has been followed by a decrease in accounting rates, and compares the current European situation with the evolution of telecommunication services in the United States, that culminated with the breakup of AT&T, the opening of telephony to competition, and the lowering of accounting and collection rates.

II. Competition Law and Telecommunications Undertakings: The Commission Comes out of the Closet

Modern telecommunication is the conduit for information, the thread that weaves the economic system together, and a necessary precondition to economic development. So great is the importance of fast information in modern commerce that it is starting to be recognized as the fourth factor of production, in addition to land, labor and capital.[15] The share of telecommunications in the EEC's Gross National Product (GNP) is expected to more than double, from three percent in 1984 to over seven percent in 1999.[16]

The goal of the European Community's competition policy is to maximize efficiency and quality in the distribution of goods and services within the Common Market and thus promote eco-

15. Helmut Ricke, *Germany's TELEKOM: A New Way of Doing Business in a Liberalized Market*, TELECOMM. J., Oct. 1991, at 714.

16. *Id.*

nomic growth and activity.[17] Competition policy is one of the most highly developed areas of EEC law, perhaps second only to agriculture.[18] The success of the Common Market depends to a great extent on the success of competition policy. Thus, competition policy is one of the areas where the European Commission is most active, and where its actions are more likely to be upheld by the European Court of Justice.[19] Although the Directorate General XIII (DG XIII) is responsible for telecommunications, it is DG IV, charged with competition policy, which has initiated and pursued liberalization in this sector.[20]

Not until fairly recently did the Commission turn its competitive attention to the telecommunications sector. Telecommunications monopolies are a deeply entrenched and immensely profitable institution, and one that Member States are not likely to give up without a fight. For this reason, the Commission had to establish its power firmly and wait for the right political moment to make its move. The Commission has accomplished its move towards greater liberalization in seven steps: the *British Telecom* decision, the Green Paper on Telecommunications, the Equipment and Services Directives, the Council Resolution of June 1988, the Commission's Telecommunications Guidelines, and recent statements regarding the impending liberalization of voice telephony.

A. The British Telecom Case

British Telecommunications, decided in 1982, was the first unfair competition case involving a telecommunications entity.[21] In that case, the Commission held that British Telecom, a common carrier, had abused its dominant position when it refused to allow private message-forwarding agencies to route messages originated by and destined for residents of other countries through its network. In upholding the decision, the European Court of Justice specifically rejected the argument that Article

17. *See generally* JOSEPHINE STEINER, EEC LAW, ch. 12 (2d ed. 1990).

18. *Id.* at 102.

19. Tycho H.E. Stahl, *Competition-Oriented Merger Control: A Tool for Unifying the European Community*, 14 INT'L MERGER L. 15 (1991).

20. *See generally* Peter F. Cowhey, *Telecommunications*, *in* EUROPE 1992: AN AMERICAN PERSPECTIVE, 159, 192-93 (Gary C. Hufbauer, ed. 1990).

21. Commission Decision of 12 December 1982, O.J. (L 360) 36.

222, which states that the EEC Treaty "shall in no way prejudice the rules in Member States governing the system of property ownership," prevails over Article 86, which prohibits abuse of a dominant position.[22] Thus, the Court upheld the Commission's chastising of a national public monopoly on competition grounds, and also upheld the application - albeit limited - of European competition law, at least to its operations as an undertaking. Armed with the Court's approval of its actions, the Commission has invoked the *British Telecom* decision for the principle that telecommunications monopolies are subject to the competition rules of the EEC Treaty, as well as to the Articles guaranteeing free movement of services and goods, as a means to prevent Member States from expanding their telecommunications monopolies to cover new technologies and services.[23]

B. The Green Paper

In 1987, the Commission took an additional step by publishing a Green Paper on Telecommunications, which acknowledged the need for increased competition in telecommunications as a way to "provide European users with a greater variety of telecommunications services, of better quality and at lower cost."[24] After recognizing the vital importance of new telecommunications services to economic development,[25] the Commission introduced its procompetitive push by stating that "the traditional form of [organization] of the sector does not allow the full development of the potential of these new services."[26] The Commission added that, because of rapid technological advances in the field, the telecommunications structures and policies of the Member States must be "fundamentally reviewed"[27] in order to "allow the full development of the supply of services

22. Case 41/83, Italy v. Commission, 1985 E.C.R. 873; TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 86, 222.

23. James E. Darnton & Daniel A. Wuersch, *The European Commission's Progress Toward a New Approach for Competition in Telecommunications*, 26 INT'L LAW. 111 (1992).

24. COMMISSION OF THE EUROPEAN COMMUNITIES, TOWARDS A DYNAMIC EUROPEAN ECONOMY, Summary Report Concerning the Green Paper on the DEVELOPMENT OF THE COMMON MARKET FOR TELECOMMUNICATIONS SERVICES AND EQUIPMENT 3 (emphasis omitted).

25. *Id*. at 1.

26. *Id*.

27. *Id*.

. . . thus making it possible for industry to take full advantage of this potential"[28] by "setting them in a more competitive framework."[29]

Thus, in the Green Paper, the Commission made clear its intention to open the telecommunications sector to competition as far as the political climate would allow. Instead of guaranteeing monopoly conditions for incumbent telecommunications entities, the Green Paper merely recognized their right to "compete alongside other suppliers in the provision of new services."[30] The Commission subsequently acknowledged that the lack of political consensus made opening all services for competition impossible.[31] Therefore, it limited itself to asserting its intention to revise its policy later, while for the moment allowing the governments of the Member States to preserve their telecommunications administration's monopoly over voice. At the same time, the Commission made clear that the competitive process would not stop there, stating that "[t]he proposed process is iterative, it accepts the existence of a movement, not all aspects of which can be defined today."[32] With this statement, the Commission left the door open for further reforms in the interest of developing "the conditions for the market to provide European users with a *greater variety* of telecommunications services, of *better quality* and at *lower cost*."[33]

C. *The Directives*

As announced in the Green Paper, the Commission issued two competition directives, one in 1988 on telecommunications equipment,[34] and the other in 1990 regarding services.[35] The Directives were issued under Article 90 of the EEC Treaty, which allows the Commission to issue Directives to Member States

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28. *Id.*

29. *Id.* at 3 (emphasis omitted).

30. *Id.* (emphasis omitted).

31. COMMITTEE OF THE EUROPEAN COMMUNITIES, TOWARDS A COMPETITIVE COMMUNITY-WIDE TELECOMMUNICATIONS MARKET IN 1992: IMPLEMENTING THE GREEN PAPER ON THE DEVELOPMENT OF THE COMMON MARKET FOR TELECOMMUNICATIONS SERVICES AND EQUIPMENT, COM(88) 48 at 13 [hereinafter IMPLEMENTING THE GREEN PAPER].

32. *Id.* at 10.

33. *Id.* at 7.

34. Equipment Directive, *supra* note 13.

35. Services Directive, *supra* note 13.

without consultation with the other European Community institutions. The use of Article 90 is very controversial because it bypasses the Council (composed of representatives of the twelve countries acting in the national interest) and allows the Commission to impose Directives disfavored by Member States. Recalcitrant Member States immediately challenged both Directives.[36]

1. The Equipment Directive

The Equipment Directive opened telecommunications terminals to full competition by eliminating all telecommunications administration monopolies over hardware. Although the terms and effect of the Equipment Directive are beyond the scope of this Comment, the European Court of Justice's treatment of the Member States' challenge of the Directive strongly indicates its support of the Commission's aggressive procompetitive actions. France,[37] with the support of Greece, Italy, Belgium and Germany, challenged the Directive on two grounds: first, that the Commission's use of Article 90(3)[38] to issue a Directive without consultation was improper, and second, that the Directive violated the Treaty.

France argued that Article 90(3) could only be applied prospectively, and that the Commission lacked the authority to use it to disband already existing monopolies. The European Court of Justice rejected this argument as contrary to the plain language of Article 90(1), which directs Member States to "neither enact *nor maintain*"[39] rules allowing public undertakings and holders of special rights to engage in anticompetitive behavior. France also argued that the Commission was barred from taking actions "establishing the internal market"[40] on its own under Article 100 A, which requires that the Council approve any such measures "by a qualified majority . . . in cooperation with the European Parliament and the Economic and Social Commit-

36. *See generally* Darnton & Wuersch, *supra* note 23.

37. Case C-202/88, *France v. Commission,* 5 C.M.L.R. 552 n. 14.

38. EEC TREATY art. 90(3). Article 90(3) allows the Commission to issue Directives to Member States to fulfill Sections (1) and (2) of Article 90 by stating: "The Commission shall ensure the application of the provisions of this Article, and shall, where necessary, issue appropriate directives or decisions to Member States."

39. *Id.* art. 90(1) (emphasis added).

40. *Id.* art. 8 A.

tee."[41] In France's view, by fundamentally altering the market structure of telecommunications hardware, the Equipment Directive constituted such a measure. The European Court of Justice, however, drew a distinction between general decision-making under Article 100 A and the specific enforcement powers conferred to the Commission in competition matters under Article 90.[42]

The European Court of Justice's decision on the legality of the Commission's actions in issuing the Directive was a great triumph for the Commission. The decision settled the dispute over the Commission's power to draw the Community closer together by using competition policy to install new rules by fiat. Equally important was the Court's application of its *Dassonville*[43] decision to rule that the Equipment Directive did not violate the provisions of the EEC Treaty. *Dassonville* held that "all trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade" are illegal under Article 30.[44] With regard to the Equipment Directive, the Court held that preserving monopolies could have the effect of hindering trade, because given the fast-advancing nature of telecommunications equipment, it was unlikely that any one undertaking would be able to keep abreast of all innovations, offer all models available and ensure the sustained quality of the equipment.[45] Monopolies would prevent consumers from purchasing more modern equipment manufactured by other companies, thus constituting having the same effect as a quantitative restriction on trade between Member States under the *Dassonville* formula.

2. The Services Directive

Because the Member States so hotly contested the Equipment Directive, the Commission agreed to consult the Council and the European Parliament before issuing the final version of

41. *Id.* art. 100 A.

42. Case C-202/88, *France v. Commission*, 5 C.M.L.R. 552 at ¶¶ 19-27.

43. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837, 2 C.M.L.R. 436 (1974).

44. *Id.*

45. *France v. Commission*, 5 C.M.L.R. at ¶¶ 33-35, 40-44.

the Services Directive.[46] The Services Directive abolishes all monopolies on services to the general public except for voice telephony, but it orders telecommunications administrations to align the price of calls with cost. It also mandates the publication of all technical interfaces so that private operators of value added networks can interconnect with the public switched network (PSN). As a part of the compromise between the Commission and Member States, this Directive was tied to a Council Framework Directive on Open Network Provision (ONP) that provides for nondiscriminatory and efficient access to public telecommunications networks by users and providers of telecommunications services.[47] The Framework Directive will be followed by more specific directives aimed at particular sections of the telecommunications sector, including voice.[48]

The Member States' appeal of the Services Directive is still pending before the Court of Justice.[49] However, the Court's *Dassonville* reasoning seems equally applicable to the services area, if not more so. Voice monopolies prevent consumer access to more advanced and lower-priced communications services by limiting the number of innovative competitive players in the market.

D. The Council Resolution of June, 1988

In June of 1988, the Council issued a resolution stating that tariffs should be aligned with actual costs.[50] The Commission began to review progress in this direction in early 1992.

E. The Telecommunications Guidelines

On September 6, 1991, the Commission issued guidelines that will allow it to impose fines of up to ten percent of global

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46. A. Winter, et al., Europe without Frontiers: A Lawyer's Guide 238-39 (1990).

47. Council Directive 90/387 on the Establishment of the Internal Market for Telecommunications Services, 1990 O.J. (L 192) 1, 3.

48. The Effects of Greater Economic Integration within the European Community on the United States, USITC Pub. No. 2318 at 21-9 (Sept. 1990).

49. Case C-319/89, Belgium v. Commission, 1989 O.J. (C 308) 7; Case C-331/89, Italy v. Commission, 1989 O.J. (C 309) 8.

50. Council Resolution of 30 June 30 1988 on the Development of the Common Market for Telecommunications Services and Equipment, 1988 O.J. (C 257) 1.

turnover on undertakings that do not comply with the competition rules.[51] Telecommunications authorities that allow such practices are also subject to the fine.[52] In February of 1992, an undisclosed competitor of British Telecommunications filed an antitrust suit with the Commission, alleging that British Telecommunications engages in anticompetitive practices.[53]

In an effort to enforce the competition rules, the Commission recently launched a full formal inquiry into the price of calls. After a preliminary investigation, the Commission concluded that there was reason to believe that high rates, both between EEC members and between members and third countries, result from a cartel-like arrangement.[54]

F. Recent DG IV Statements

The Directorate General for Competition is giving signs of its readiness to take liberalization one step further. In the course of a recent official visit to Spain, Sir Leon Brittan, head of DG IV, announced that he saw no reason to preserve voice monopolies.[55] Sir Leon based this statement on a comparison between the current situation in Europe and the U.S. market and concluded that the European market is inefficient.[56] Spain was one of the countries that most strongly opposed the introduction of competition.[57] One month later, the Commission started to discuss opening international voice telephony to competition by branding it a service distinct from local voice telephony, which would remain a reserved service.[58] If this solution is adopted by the Commission and enforced through Directives, the face of European telecommunications will be changed forever. New

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51. Guidelines on the Application of EEC Competition Rules in the Telecommunications Sector, 1991 O.J. (C 233) 2.

52. *Antitrust Guidelines Pose Major Challenge to EC Telecom Sector*, EC COMPETITION LAW REPORTER, Oct. 28, 1991, at 5.

53. Jennifer L. Schenker, *BT Under Fire*, COMM. WK. INT'L, Mar. 16, 1992, at 1.

54. Commission of the European Communities, *Commission Launches Formal Investigation into International Telephone Charges*, Press Release No. 648, RAPID, July 4, 1991, *available in* LEXIS, Europe library, Rapid file.

55. M.J. Stanek & L Gómez, *Leon Brittan ataca los monopolios de telefonía*, LA GACETA (Madrid), Feb. 5, 1992 at 126.

56. *Id.*

57. Cowhey, *supra* note 20, at 194.

58. Malcolm Laws & Jennifer L. Schenker, *Euro-Long Distance at Hand*, COMM. WK. INT'L, Mar. 16 1992, at 1.

forms of competition will enter the market and will drive down collection rates and accounting rates.

III. The Many Faces of Competition

The Organization for Economic Cooperation and Development (OECD) has issued several reports advocating competition in the telecommunications market. The OECD has found that competition has made telecommunications enterprises more profitable and at the same time has lowered costs and increased volume.[59] Other sources argue that competition has the potential to make telecommunications businesses even more profitable by freeing pent-up demand for services stifled by monopolies.[60]

There are two larger competition issues facing the European market: competition between different carriers for the voice market in each country, and competition between countries for voice traffic and business. The liberalization of the market for telecommunications services will have a dramatic impact on both, and is likely to force the PTTs to agree to lower accounting rates for fear of losing a large volume of calls. This Comment argues that at the national level, the only form of effective competition is that provided by other telephone companies within each country, and that in countries where such competition exists, accounting rates and collection rates go down. Similarly, at the international level, competition between countries for voice traffic and business establishments must lead to lower accounting and collection rates.

A. The National Level

A large number of Member States have chosen to preserve the voice monopoly of their telecommunications entity. In those countries, competition in the voice market is limited to that coming from the American carriers and an upstart new company, International Discount Telecommunications (IDT). Because the number of callers that have access to these competitive services is very limited, the American carriers' programs have

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59. Amy Plantin, *The Brave New World of Telecommunications*, OECD Observer, Dec. 1990, at 6.

60. Tim Hills, *The European Chance; US Service Suppliers in Europe*, Comm. Int'l, Dec. 1990, at 60, *available in* LEXIS, Cmpcom library, Cmintl file.

been unable to affect accounting and collection rates. However, the emergence of IDT in particular is a telling sign of the magnitude of the pricing problem for companies established in Europe.

Two Member States, the United Kingdom and Germany, have already introduced domestic competition in their respective voice markets by allowing companies other than the government-owned entity to provide voice services. In both of these countries, a dramatic reduction in accounting rates has followed.

1. Foreign Competitors

The first natural competitors of the national PTTs are the American long-distance carriers that terminate calls in those countries. In countries where the state monopoly is still in place, these carriers are the only source of competition. The large disparity in the price of a call, coupled with the language barrier, has been one of the reasons for the thriving of USA Direct and collect call programs.[61] Collect calls to the United States and Call USA Direct programs are two ways in which it is possible to circumvent the national long-distance company and take advantage of the lower American rates.[62]

Call USA Direct programs abroad work in the same way as access to long-distance companies in the United States. The customer is given a local number to call. For the price of a local call, the customer is able to access the network of the American long-distance carrier offering the service.

A telephone call is priced at the rate applicable to the party billed.[63] By using either of these reverse-billing systems, Americans traveling abroad can take advantage of the lower collection rate. Even though the American phone company imposes a surcharge over the normal station-to-station rates for the same service, the call often costs considerably less than if the local long-distance carrier is used.

Unfortunately, these two systems have major limitations.

61. Elisa Tinsley, *Rates Cuts to Ring In for Callers to USA*, USA TODAY, May 25, 1991, at 8A.

62. All three major American long-distance carriers offer such programs. MCI's "Call USA" offers service for 45 countries, U.S. Sprint's "Sprint Service" is available in 18 countries, AT&T's USA Direct also provides service from a number of countries. *Id.*

63. Interview with Michael Mandigo, Attorney Advisor, Common Carrier Bureau, FCC (Feb. 11, 1992).

Placing a collect call requires that somebody at the number called accept the charges. To take advantage of Call USA Direct plans, callers must have a telephone in the United States, or at least carry the phone card of an American long-distance company that offers that service in that particular country.[64] Given these constraints, competition from these programs is minimal, and does not constitute a real solution to the problem.

A third, more sophisticated option has emerged recently for businesses that have a large call volume. International Discount Telecommunications (IDT), a U.S.-based company, now offers long-distance lines to overseas businesses at American prices through a remarkable technological scheme. The customer is given a number to call in the United States. After three rings, the customer hangs up. Because no connection has been established, the local telephone company does not bill the customer for the attempted call. The IDT software is able to identify the calling customer, and calls the customer back within three seconds with an open line through which the customer can make a call to any other country in the world at U.S. rates.[65] Businesses were initially reticent to use this system for fear of reprisals from the foreign governments. Recently, however, the World Bank began using IDT in several countries to avoid high telephone charges.[66] Because the legality of this service is very controversial, the World Bank is only using IDT to make calls out of countries that receive funding from the Bank.[67]

Under the present system, foreign competitors can only offer a minute amount of competition. U.S. companies have very limited access to European markets and are only able to offer their services to a small number of customers with strong ties to the United States, or to businesses with a large volume of calls. This form of competition is too small to affect the national telecommunications administrations and give them an incentive to lower accounting rates. Domestic competition, on the other hand, has had a much greater effect on rates.

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64. For example, while both MCI and AT&T offer this service in France, neither offers it in Spain.

65. Quesada, *Larga Distancia: Llamar a EEUU por la compañía IDT cuesta un 75% menos que a través de Telefónica*, EL PAÍS, Feb. 2, 1992, at 10.

66. *International Telephone Calls: The Miracle of Hackensack*, THE ECONOMIST, Feb. 15, 1992, at 79.

67. *Id.*

2. Domestic Competitors

The effect of domestic competition on accounting and collecting rates illustrates the effect that the Commission's proposal to declare international calling a nonreserved service would have on international accounting rates. In both countries where competition has been introduced, accounting rates and collection rates have dropped.

The United Kingdom opened telephony to competition in 1984.[68] British Telecom and Mercury Communications were granted a duopoly until 1990.[69] The British government has now opened voice to competition, and requires British Telecom to grant free access to the network until 1997 to all competitors with a market share of under ten percent.[70] A reduction in the accounting rate followed. In 1990, Mercury agreed to reduce the accounting rate, and to reduce it further on January 1, 1993.[71] British Telecom promptly matched this reduction.[72] As a result of these agreements, AT&T and MCI recently filed proposals with the Federal Communications Commission to reduce accounting rates from $1.06 per minute during peak hours to $ .76 in 1991, $ .50 in 1992 and $ .40 in 1993.[73] A decrease in collection rates is expected to follow.[74]

Germany is now one of the principal advocates of free competition in the telecommunications sector.[75] Although it has not introduced competition in voice monopoly, Germany has taken significant steps towards liberalization. Faced with the need to rapidly modernize the Eastern part of the country, the German government has liberalized cellular telephony while keeping terrestrial telephone service as a monopoly.[76]

Liberalization has forced the monopoly to act competitively

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68. VERENA A.-M. WIEDEMANN, LAW OF INTERNATIONAL TELECOMMUNICATIONS IN THE UNITED KINGDOM 205 (1989).

69. Plantin, *supra* note 59, at 6.

70. *On balance, good*, ECONOMIST, July 27, 1991, at 54.

71. Letter from Peter van Cuylenburg, Chief Executive Officer of Mercury Communications, to Alfred Sikes, Chairman of the Federal Communications Commission (June 13, 1991).

72. *Id.*

73. *Carriers Prepare for Tariff Cuts between U.S. and U.K.*, DATA COMM., Dec. 1990, at 48, *available in* LEXIS, Cmpcom library, Data file.

74. *Id.*

75. Cowhey, *supra* note 20, at 195.

76. Ricke, *supra* note 15, at 711.

both in the restricted and the competitive area. As an aspiring global competitor, Deutsche BundesPost (DBP) recognizes that the days of the voice monopoly are numbered, and is using the remainder of its time as a monopoly to become globally competitive by cutting costs and introducing technical innovations.[77] In the competitive areas, DBP is under intense pressure to provide the best possible service at the lowest price. In an effort to ameliorate its competitive position, Germany lowered its accounting rate with the United States by seventeen percent in December 1990.[78] On February 14, 1992, the board of Deutsche Bundespost Telekom approved a resolution to lower phone rates to the U.S. by an additional thirty-seven percent effective May 1, 1992.[79]

B. The International Level

On the international level, two factors create a strong incentive for lower accounting rates. The first factor is the development of technology that permits telephone companies to route calls through different countries to take advantage of lower rates. The second factor is competition between Member States for foreign business establishments.

1. Technological Advances

Technological advances now make it possible to route calls selectively.[80] With a call from New York to Rome, for example, it is no longer necessary to use a direct route. The call can be forwarded to England, switched there by Mercury Communications or British Telecom, and be sent for the Italian long-distance company, Italcable, to terminate. Intra-European accounting rates are typically lower than cross-Atlantic rates.[81] At the same time, some European countries, notably the United Kingdom, have lower accounting rates than others for dealings with the United States. This system involves at least one addi-

77. *Id.* at 713.

78. Jay Mallin, *Telephone Trap; Calls from U.S. Ring Up Big Bucks Abroad*, WASHINGTON TIMES, Apr. 5, 1991, at C1.

79. *DBP Telekom to Cut Rates to North America 37%, Proposes Leased Line Rate Reform*, TELECOMM. REP., Mar. 2, 1992, at 33.

80. Tinsley, *supra* note 61, at 8A.

81. Interview with Mandigo, *supra* note 63.

tional party in the completion of a long-distance call, but has the advantage of permitting the caller to avoid the high rates in effect between the United States and the country receiving the call.

Because of the Commission's *British Telecom* decision,[82] countries cannot outlaw this practice. The only way for telecommunications administrations to stem this practice is to lower the accounting rate, and thereby make it less attractive to route calls through third countries.

2. Competition between Member States

Once the United States has negotiated a lower accounting rate with one of the members of the European Community, the other members will be under pressure to do the same in order to prevent businesses from establishing themselves in a lower-priced country.[83] One of the consequences of the EEC Treaty is that businesses formed under the laws of a Member State are free to offer their services throughout the European Community. Non-EEC companies formed under the laws of a Member State can benefit from this advantage if "their activity shows a real and continuous link with the economy of a Member State."[84] Once this requisite is fulfilled, the company gains access to the entire European Community. It is in the economic interest of the Member States to attract such companies to their territories by offering economic incentives. One of these incentives is lower-priced communications. Recognizing this fact, Helmut Ricke, CEO of Germany's Deutsche Bundespost Telekom, recently stated that in order to "make Germany an attractive location for foreign companies that plan to set up a European telecommunication centre," his company, in addition to providing custom-made telecommunications services, had achieved significant reductions in accounting rates.

C. Pan-European Competition: Hermes

Other possibilities for competition in the provision of telecommunications services are within sight. If the Commission re-

82. *See* Commission Decision of 12 Dec., 1982, 1982 O.J. (L 360) 36.

83. Margrit Sessions, *PSTN Tariffing Issues in Europe*, TELECOMM., Jan. 1991, at 73, *available in* LEXIS, Cmpcom library, Tele file.

84. General Program for the Abolition of Restrictions on Freedom to Provide Services, Common Mkt. Rep. (CCH) ¶ 1546 (1962).

defines the scope of the reserved services to include domestic voice only, it will be offering a great incentive for the development of privately-owned international networks. One such network is Hermes, a consortium of several telecommunications entities (including NYNEX) and railroad companies who have banded together to construct a communications network along the railroad's right of way. British Rail estimates that seventy-five percent of the businesses in the United Kingdom are within five kilometers of its tracks.[85] It is then easy to send the signals on to customers or switching facilities through a microwave or satellite link, much in the way Microwave Communications, Inc., better known as MCI, began doing in the United States in the early seventies. This consortium will be an added source of competition to the individual European telecommunications administrations.

IV. Conclusion

The European Commission is taking aggressive steps to liberalize telecommunications in Europe through the use of competition policy and enforcement. The Commission has come a long way from its timid beginnings. After announcing a policy for greater liberalization of the telecommunications sector in the Green Paper, the Commission has issued directives and other documents pursuing the policy and making the voice monopoly all but untenable. Recent statements by the Commission indicate that voice, the last of the great monopolies, is about to be dismantled. The European Commission recently introduced a proposal to open the long-distance market to competition by eliminating international communications from the list of reserved services. If successful, this proposal will bring Europe one step closer to a truly liberalized telecommunications market, sound the death knell for telecommunications monopolies, and result in dramatically lower international tariffs.[86]

Greater competition in the European market is likely to set free pent-up demand and make telecommunications entities more profitable, thanks to advances in technology that have dra-

85. Hills, *supra* note 60, at 60.

86. Editorial, *It's Now Or Never*, COMM. INT'L, Mar. 17, 1992, at 10, *available in* LEXIS, Cmpcom library, Cmintl file.

matically reduced the cost of long-distance communications. At the same time, competition will force telecommunications providers to align their rates with costs in order to stay competitive. As a result, the public will benefit from lower international phone rates, and the imbalance in calls into and out of the United States will at last be partially remedied. The comparison between the current European situation and the situation in the United states after the AT&T divestiture is inescapable.[87] The United States long-distance market was also liberalized through antitrust enforcement.[88]

Thanks to the liberalizing process undertaken by the European Commission, the Federal Communications Commission may see its goal of lowering international accounting rates accomplished without having to resort to the unpalatable solution of dictating maximum international accounting rates to U.S. carriers.

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87. *Id.*

88. *See* United States v. AT&T, 552 F.Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

BOOK REVIEW

Federal Telecommunications Law, Michael K. Kellogg, John Thorne, & Peter W. Huber, Little, Brown and Company (1992)

The Geodesic Network II: 1993 Report on Competition in the Telephone Industry, Peter W. Huber, Michael K. Kellogg & John Thorne, The Geodesic Company (1992)

Law and Regulation of Common Carriers in the Communications Industry, Daniel L. Brenner, Westview Press (1992)

Reviewed by William R. Malone*

The fall of 1992 saw publication of three books of special interest to the communications bar. The first of the three is a 900-page treatise analyzing currently controverted legal issues in the field of telecommunications, *i.e.*, non-broadcast services. The second book, by the same authors, is the substantive companion to the first. It analyzes the policy implications of structural changes in the domestic telecommunications market since the 1982 Bell consent decree.[1] It is the sequel to the best-selling *The Geodesic Network*, written by one of the co-authors in support of the first—and perhaps last—triennial review of the consent decree. The third book holds itself out as a "casebook-plus-commentary" offering "a basic introduction to the regulation of

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1. United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.C.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

the telephone and other common carriers."[2]

The need for a treatise to coherently interpret the law governing telecommunications has become increasingly urgent as new technology and new entrants have changed the market and new regulation has overlain the old. At the turn of the century, the telecommunications market was simpler, if more precarious. Little more regulation than the English law of common carriers and the patent law seemed necessary or even conceivable. Then came the state commissions, who soon found their intrastate regulatory powers stultified by the Bell System's interstate shell game. Congress responded by superimposing a federal analog over existing state regulation. As the carriers' natural monopolies were eroded by new technology, however, the courts and the Federal Communications Commission cut loose federal regulation from its antecedents and began to pour the hot new wine of competition into old statutory bottles—cracking quite a few in the process. In short, telecommunications regulation, lacking a divine plan, "just growed" in reaction to changes of the industry.

Undaunted by the scope and complexity of providing a coherent explanation of the present-day regulatory patchwork are three co-authors who together bring to bear a unique perspective on the evolution of the telecommunications market and its regulation. Michael K. Kellogg is a partner in antitrust law in the Washington, D.C. office of Mayer, Brown & Platt. John Thorne is an assistant general counsel of Bell Atlantic. Dr. Peter W. Huber, a former associate professor at M.I.T., wrote *The Geodesic Network*, a report on competition in the telephone industry that the Department of Justice submitted to Judge Greene in 1987.

Federal Telecommunications Law attempts to cover its chosen field in 900 heavily footnoted pages. Having described the telecommunications industry in transition and the regulatory powers of the FCC in chapters one and two, the authors turn to antitrust. Their thesis is that "the U.S. telephone industry has been shaped more by antitrust law than by any [other] aspect of federal or state regulation."[3] After a survey of antitrust princi-

2. DANIEL L. BRENNER, LAW AND REGULATION OF COMMON CARRIERS IN THE COMMUNICATIONS INDUSTRY (1992).

3. MICHAEL K. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW 137 (1992).

ples and litigation, the book devotes the next 200 or so pages to the restructuring of the industry under the 1982 Bell consent decree. This, to my way of thinking, is the heart of the book. It gives fast and sure access to the body of law relating to the consent decree through early 1988. The authors then move on to pricing, customer premises equipment, enhanced services, interexchange (long distance) service, the interface between the telephone companies and CATV, international issues, and privacy. A glossary of tariff and technical terms is included.

The overarching strength of the book lies in its ability to divine the cumulative impact on a given activity of concurrent agency and judicial regulation. Along the way the authors are not shy about pointing out the inconsistencies and outright contradictions in governmental regulation, as the focus of decision-making shifts back-and-forth between the Commission and Judge Greene. The book appears to reflect current developments through the first quarter of 1992, and provision has been made for annual supplementation. The treatise is available on floppy disks from The Geodesic Company.

Comprehensive as the book is, 900-pages simply does not permit full coverage of all the federal legal issues a telecommunications counsel, policy-maker, or operator will encounter. The book only mentions classical ratemaking principles in passing, while lifeline assistance and the universal service fund are not discussed. This is not an FCC practice manual—the practitioner will have to look elsewhere for a discussion of Title III licensing procedures or even the various statutes of limitation in section 415 of the Act. International telephone operations and regulation would require another whole book beyond the forty pages the treatise devotes to international issues.

Nevertheless, for the areas *Federal Telecommunications Law* does cover, the treatise stands alone. Its analysis is clear and fully annotated. It should be the first resort of any associate who seeks a quick but sure understanding of a telecommunications sub-market and the concurrent, if not conflicting, regulations imposed by agency and court. More experienced practitioners will want to consult it for analogies and implications in more complex transactions.

The authors do not side with the telephone companies in all areas, but have taken an intellectually rigorous approach to controverted issues. They are ever-eager to point out the inconsistencies and historical ironies of the twists-and-turns of agency and court, apart and together. At one point they wonder how different the industry structure today would have been if Judge Waddy's *Sprint* case had been assigned to Judge Greene instead of to Judge Richey, and Judge Waddy's *Western Electric* case had been assigned to Judge Richey instead of to Judge Greene. At another point they contrast Judge Greene's finding that in-place wiring on customers' premises "is as much a 'bottle-neck' as are the subscriber access lines"[4] with the FCC's "precisely . . . opposite" conclusion a scant few years later.[5]

In sum, the Kellogg-Thorne-Huber treatise should be a utilitarian addition to the bookshelf of any practitioner or policy-maker who is called upon to litigate or analyze federal telecommunications issues in the 90's.

The Geodesic Network II: 1993 Report on Competition in the Telephone Industry updates the first edition, published in 1987 by the U.S. Department of Justice as part of its obligation to conduct a formal, triennial review of the line-of-business restrictions imposed upon the Bell operating companies at the time of divestiture.[6] Written by Dr. Huber in his role as consultant to the Department, *Geodesic* plumbed the implications for the telephone network of the reversal in relative costs between switching and transmission. Based on the premises that "when switching is expensive and transmission is cheap, the efficient network looks like a pyramid" and that "by contrast, when switching is cheap and transmission expensive, the efficient network is a ring,"[7] Dr. Huber concluded in 1987 that the decree's horizontal segmentation of the pyramid was technologically obsolescent. "Divestiture", the co-authors of *Geodesic II* observe, "accomplished many positive things, but the architects of divesture plainly failed to anticipate fundamental changes that would sweep across the industry in the decade after the decree was

4. United States v. Western Elec. Co., 569 F. Supp. 1057, 1129 (D.D.C. 1983).

5. Detariffing the Installation and Maintenance of Inside Wiring, 51 Fed. Reg. 8498 (1986), *on recon.*, 1 FCC Rcd 1190 (1986), *further recon'd*, 3 FCC Rcd 1719 (1988), *remanded sub nom. NARUC* v. *FCC*, 880 F.2d 422 (D.C. Cir. 1989).

6. United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 194-95 (D.C.C. 1982), *aff'd mem. sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

7. PETER W. HUBER, THE GEODESIC NETWORK: 1987 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY § 1.3 (1987).

drafted."[8]

Geodesic focused on the development of competition in the post-divestiture telecommunications marketplace. The authors in *Geodesic II* set out to describe the competitive state and direction of the industry at the beginning of the decree's second decade. They end up making the case for the proposition that the decree has performed imperfectly because of flawed fundamental assumptions and will perform even less perfectly in the future as the structure of the industry, driven by technological changes, increasingly diverges from the obsolescent assumptions of the decree. "Within the next decade at most, and more likely five years or so," the authors conclude, "the divestiture decree will have to be abandoned."[9]

The decree, the authors say, has it all backwards.[10] The competitive sub-market is not inter-exchange services at all but rather local exchange services. The consent decree was based on the economics of microwave relay in the inter-exchange network and copper cable in the local exchange network. Today, optical fiber drives the inter-city market, and microwave radio has come to the local exchange.

The authors make the case that AT&T's economies of scale in the inter-exchange market are overwhelming, and only the FCC's regulatory pricing umbrella enables the competing inter-exchange carriers to survive. Toll rates have come down since divestiture but not as much as access charges have been reduced.

Local exchange service is not the natural monopoly it once was with cellular radio, radio-based personal communication services, wireless LAN's, cable television, and fiber-based access providing competition. No longer does the typical subscriber have only a single pathway to the network. He has multiple pathways, and the conception of the local loop and the local exchange switch as a "bottleneck" is anachronistic. By-pass is rampant, and even AT&T is reaching down into the exchange to serve the customer directly via radio.

Geodesic II concludes by describing and analyzing the information services and manufacturing submarkets in a similar

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8. PETER W. HUBER ET AL., THE GEODESIC NETWORK II: 1993 REPORT ON COMPETITION IN THE TELEPHONE INDUSTRY (1992).

9. *Id.* at § 1.1.

10. *Id.* at § 1.1.

fashion. In sum, the book contains a wealth of data and a treasury of provocative ideas for lawyers, economists, and policymakers. *Geodesic II* is also available on floppy disk.

Law and Regulation of Common Carriers in the Communications Industry is a collection of excerpts from cases and materials, primarily federal, which the author has arranged by topic and connected by commentary. The collection has been assembled for pedagogical purposes by Professor Daniel L. Brenner, until recently director of the UCLA Law School Communications Program, and his two predecessors, Charles Firestone and Tracy Westen.

The 300-page book, however, has utility outside the classroom. *Law and Regulation of Common Carriers* will serve the practicing lawyer and researcher equally well as a quick reference to the basic documents on a dozen different topics, from price caps to access and bypass to enhanced services.

One seeming weakness of the format, however, is that the interrelations among these topics tend to be presented implicitly, rather than explicitly, and are not always fully articulated. Nevertheless, the dustcover quite properly notes that the book "presumes no specialized background in technology, law, or economics and therefore provides an ideal introduction to this increasingly important field for professionals as well as for scholars and students interested in any aspect of communications and communications policy."[11]

11. DANIEL L. BRENNER, LAW AND REGULATION OF COMMON CARRIERS IN THE COMMUNICATIONS INDUSTRY (1992).

ARTICLES DIGEST

Jeremy Harris Lipschultz, *Conceptual Problems of Broadcast Indecency*, 14 COMM. & LAW 3.

In response to political pressure, the FCC has dramatically increased regulation over "indecent" radio broadcasts in recent years. The author argues that the lack of clear standards of what constitutes broadcast indecency combined with the current application of a "generic legal definition" has led to unsatisfactory, haphazard results which do not provide sufficient content guidelines for the broadcast industry. Additionally, he suggests that while the FCC should continue its ban of obscenity on the airwaves, the regulation of indecency is unnecessary and should be terminated.

Lipschultz traces the history of federal regulation of broadcast indecency. In the 1970s, the FCC first utilized its power to restrict specific forms of non-political speech by reveiwing announcers' speeches, lyrics and audience participation on radio programs. Indecency, as opposed to obscenity, is constitutionally protected speech, but the Federal Communications Act of 1934 and Criminal Code 18 U.S.C. 1464 lump together obscene, indecent and profane language, leading to inconsistent application. In 1975, the FCC decided that some on-the-air discussions of sex, including the use of specific words and innuendo, were not proper. The first, and to date still the most significant, indecency complaint filed by the FCC was against a New York station which broadcast George Carlin's "Filthy Words" monologue at 2:00 in the afternoon. While the complaint did not lead to legal action, it did establish the still-banned "seven dirty words" and also influenced the Commission in its decision to regulate indecency on the basis that "access by children is unsupervised, screening is difficult for adults and the privacy of the home justifies it."[1] This led to a policy of channeling broad-

1. FCC v. Pacifica Foundation, 438 U.S. 726, 730 (1978)

casts with supposed indecency to times of the day when the FCC believed children would not be likely to be listening to the radio.

The FCC's channeling regulation first came under judicial review in *Pacifica* in 1978. A divided Supreme Court upheld the daytime limits on indecent broadcasts, holding that, in general, indecent language can be avoided because "there are few thoughts that cannot be expressed by the use of less offensive language."[2] The Court, however, made no attempt at defining what is indecent language, and neither did the FCC until it began enforcing regulations against individual stations in 1987.

In response to Congressional pressure in 1988, the FCC broadened its interpretation of indecent, imposed a 24-hour ban and began fining radio stations for violating indecency regulations. After a Congressional directive which threatened to limit the Commission's funding, the FCC expanded its definition of braodcast indecency to include sexual or excretory activites or organs and instituted a total ban on indecent broadcasts. Although the holding of the "Dial-a-Porn" case, *Sable Communications v. FCC*,[3] specified that indecent, but not obscene, messages are constitutionally protected, and Justice Brennan's concurrence questioned the lack of specific definitions of obscenity and indecency and addressed the possibilities of chilling protected speech, the FCC pushed ahead with its new policy of warning and fining stations for indecent broadcasts.

Between May 1989 and January 1990 the FCC charged 12 stations with violating FCC rules by transmitting indecent broadcasts. According to Lipschultz, the underlying governmental rational for the new policy was an assumption that pornography negatively impacts children and can lead to violence and societal problems. The FCC sent warning letters and imposed fines on stations in metropolitan areas across the country for "sexually explicit" conversations with listeners, explicit parodies, mentions of sexual organs and general "offensiveness." In one instance, a licensee of Nationwide Communications was even notified of a complaint stemming from its airing of Prince's "Erotic City," a commercially distributed song. Lipschultz, however, contends that not only did the Commission never clar-

2. Id. at 743.
3. 492 U.S. 115 (1989).

ify the differences between the various fines it imposed, ranging from $2,000 to $10,000, it also never applied a more analytical or precise definition of indecent than "it is broader than the Carlin seven dirty words, including talk of the penis and animal sex."[4] This, Lipschultz argues, led to industry-wide confusion rather than a comprehensive standard.

Lipschultz urges a more coherent FCC policy for its regulations to have any impact on the broadcast industry. While he approves of continuing the ban on obscene language, Lipschultz advocates permitting indecent language on the air and argues that no evidence of negative modeling effects on children exists. Lipschultz also suggests a discontinuation of channeling. Finally, he points out that since the FCC has left the realm of Carlin's seven dirty words in applying its indecency regulations, it is better off utilizing social theory on sex-role stereotyping, gender culture and analysis of dominance in media content than categorizing innuendo in fashioning a workable definition of broadcast indecency.

D.S.

Bernhard Jurgen Bleise, ***Freedom of Speech and Flag Desecration: A Comparative Study of German, European and United States Laws*****, 20 DENV. J. INT'L L. AND POL'Y 471.**

The article addresses whether flag desecration is protected by the freedom of speech. The author examines the approaches that three distinctive legal systems have taken to this thorny question.

Bleise first analyzes the German Constitutional bases for a right to freedom of speech. Article 5(I) protects freedom of expression, which encompasses freedom of speech, information, press, radio, and film, and prohibits censorship. Article 5(II) al-

4. Infinity Broadcasting, 2 FCC Rcd. 2705 (1987).

lows the rights protected by Article 5(I) to be limited by general laws, laws to protect youth, and the right to "inviolability of personal honor." A law that restricts freedom of expression is considered a general law only if it is not directed against a particular viewpoint. Furthermore, a law that restricts freedom of speech in order to protect youth must be created for such a purpose and be suited to such protection. For the law of personal honor to limit freedom of speech, it must be statutory. Article 5(III) of the German Constitution further creates an unrestricted right to artistic expression, as well as freedom for teaching, science, and research.

The third title of the German Penal Code, "Endangerment of the Democratic Constitutional State," can come into conflict with the constitutionally protected right to freedom of expression. In particular, Bleise notes section 90(a)(1) of the Penal Code, which makes it a crime to insult or maliciously scorn the Federal Republic of Germany, or to desecrate the flag. These laws have been validated as protecting the existence of the free democratic basic order.

To illustrate how the German courts have dealt with this conflict, Bleise discusses a 1990 German Federal Constitutional Court case involving a book jacket illustration showing the desecration of a flag. Although the Court held that in this case punishment was unconstitutional, the Court determined that Section 90(a)(I) can validly be used against one who desecrates the flag, even when such desecration is in an artistic form. The Court determined that freedom of expression is not absolute and when it conflicts with other protected values, the courts must balance the competing interests. Bleise notes the flaw in this balancing test: namely that the constitutional right to freedom of expression is balanced against any state interest, not only those constitutionally mandated.

Bleise next examines freedom of speech protections under the European Convention on Human Rights, which has been ratified by 21 European nations. In Article 10(1), the Convention grants freedom of forming an opinion, freedom to express an opinion, and freedom to receive information. Violations of the rights protected by the Convention which are not cured by intra-state remedies may be brought before the European Commission of Human Rights. The Commission then may call for a decision by the European Court of Human Rights. The decision of this Court is final and binding on the contracting states.

In 1988, the European Court of Human Rights heard the case of Josef Felix Mueller[1], a Swiss artist. The question was whether the confiscation of three of Mueller's paintings for obscenity, and Mueller's subsequent conviction for obscene publication, violated his Article 10(I) right to freedom of speech. The Court determined that Article 10(II) grants the contracting states wide discretion to restrict freedom of expression when necessary. In Mueller's case, the confiscation was deemed necessary for the preservation of the morals of the Swiss population.

The First Amendment of the Constitution of the United States explicitly protects freedom of speech, and this protection has been held to extend beyond speech to conduct. Bleise discusses two recent American Supreme Court cases addressing flag desecration to judge the scope of American freedom of expression.

In *Texas v. Johnson*[2], the Supreme Court had to determine whether it was permissible to limit First Amendment freedom of speech in order to protect the American flag. Johnson had been convicted under Texas law of desecrating a flag. The Court held that Johnson's flag-burning was expressive conduct allowing him to invoke the First Amendment. They further held the state's law was content-based and applied a strict level of scrutiny. Under this heavy burden, the state's interests in preserving its symbols and preventing breaches of the peace did not outweigh Johnson's freedom of speech, and the conviction was disallowed. As a response to the *Johnson* decision, Congress passed the Flag Protection Act of 1989, but in 1990 the Supreme Court in *U.S. v. Eichmann*[3] invalidated the Act, holding that it violated the freedom of speech guaranteed by the First Amendment.

Bleise concludes by noting that freedom of speech is granted the lowest level of protection by the European Court of Human Rights, the highest by the United States Supreme Court, and a middle level by the German Federal Constitutional Court.

S.C.

1. Eur. Ct. H.R., EuGRZ 543 (1988)
2. 491 U.S. 397 (1989)
3. 496 U.S. 310 (1990)

John V. Edwards, ***Obscenity in the Age of Direct Broadcast Satellite: A Final Burial for Stanley v. Georgia (?), A National Obscenity Standard, and Other Miscellany***, 33 WM & MARY L. REV. 949 (1992).

This note discusses federal and state obscenity laws and their application to direct broadcast satellite (DBS). The FCC grants "common carrier status" to certain companies owning satellites and uplink facilities, enabling organizations which do not own their own means of transmission to use those facilities to transmit programming of their own choosing. As a condition of their special status, common carriers cannot control the content of the transmissions. Common carriers are also prohibited, however, from allowing customers to use their facilities for illegal purposes, and can face sanctions if they are involved in the production of the illegal material or have a pecuniary interest in it. The FCC does not require common carriers to screen all the material that they transmit. As a result, federal regulations supersede state statutes which would hold common carriers liable for broadcasting prohibited material within the state.

While a satellite owner may escape liability for the broadcast of allegedly obscene material, the producer and the uplink operators may still be held liable for borderline obscene materials. Typically, a broadcaster may be held liable for obscene material even if only one locality within the satellite's broadcast area considers it obscene. This is the "lowest common denominator standard." Producers of borderline obscene material must comply with the lowest common denominator obscenity statutes for states in which their product is distributed.

Usually a jury or court uses a "community" standard to determine whether or not particular material is to be designated as obscene. Justices Stevens and Brennan are among those who have been critical of this standard, and believe that federal statutes defining criminal offenses should use a national standard of obscenity, applicable throughout the country. A majority of the Supreme Court has continued to use a community standard.

A different obscenity analysis is applied to DBS, however. Broadcasters of direct broadcast satellite transmissions can control the distribution of their product by means of a scrambled broadcast signal and filters which screen out non-subscribers. Once the material reaches the home of the subscriber, the author maintains that it is protected by *Stanley v. Georgia*.[1] Courts must decide, however, if the broadcaster is protected on the basis that the signal is unintelligible until it reached the home. The author feels that a scrambled DBS may be fully protected under *Stanley* as long as the material is not considered obscene in the community from which the broadcast originates.

This note details the case of Home Dish Only Satellite (HDOS). A small number of residents of Montgomery County, Alabama had subscribed to the "American Exxxtasy" Channel, broadcast by HDOS over direct satellite from New York, and children in local schools acquired taped copies of some of the programming and circulated among their friends. After parents complained, a grand jury determined the material to be obscene by standards of Montgomery County, Alabama, and indictments were brought in Montgomery District Court. HDOS, its uplink company, and the owner of its common carrier satellite were indicted in New York, the state from which its broadcast originated, and Utah, the location of its uplink facility. The satellite and uplink owners escaped liability because of their status as common carriers, but HDOS plead guilty to two counts of distribution of obscene material and was fined $10,000 for each count in the Alabama case, and received a heavy fine and agreed to cease the distribution of obscene material as part of a plea agreement on the federal charges.

The author feels that HDOS's broadcast should have been protected by *Stanley v. Georgia* since the broadcasts were unintelligible until received by subscribers in their homes. He believes that Montgomery County's exposure to indecent materials was not unexpected since adults made a conscious effort to receive the broadcasts, and copies of tapes of the broadcasts are no different than photocopies of printed obscene material.

K.J.

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1. 394 U.S. 557 (1969).

Anne Moebes, ***Structuring Media Joint Ventures in the European Community*****, 14 HASTINGS COMM/ENT L.J. 1 (1991).**

In 1989, the European Community (E.C.) passed the Council Directive on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities[1] (Directive) which limits the amount of non-European programming that can be broadcast on European networks. In 1990, the FCC relaxed its rules, giving U.S. television networks greater freedom to hold financial interests and syndication rights in programming both domestically and abroad. In light of these developments, Ms. Moebes contends that U.S. media firms should co-produce and distribute programming in the E.C..

Moebes suggests that joint ventures are potentially symbiotic. She contends that U.S. media firms are primarily interested in the financial gains to be had in the market, while the E.C. firms are anxious to learn the technical tools of the trade from a more advanced U.S. industry. Thus, both partners stand to benefit from such an arrangement.

The author argues that the Directive merely represents a limitation and not a bar to U.S.-E.C. joint ventures. To qualify as a "European Work," the production must be made primarily with residents or one or more member states. This requirement is easily met in a joint venture by relinquishing creative control in the development and production stages to the E.C. partner. This is in the best interest of the U.S. partner anyway since the E.C. partner can bring fresh ideas and formats that are more appealing to European audiences.

Under the Directive, the U.S. partner would also have to relinquish supervisory and actual control of the co-production. However, Moebes contends that the U.S. partner should use its own key technical people to ensure the U.S. partner's future indispensability to the E.C. partner. The U.S. firm will be able to bear less of the costs of production as E.C. firms are likely to have access to other funds, including government subsidies.

1. 1989 O.J. (L298) 23.

Since the Directive does not appear to limit the U.S. partner's control over distribution, it is at this stage where opportunities lie for U.S. firms. In addition, the FCC has relaxed its rules regarding in-house production to allow U.S. networks to broadcast not only programs solely produced by the network, but also co-productions by the network and a foreign producer. Under the new Evaluation of the Syndication and Financial Interest Rules[2], both partners benefit since the E.C. partner is ensured access to all U.S. broadcast markets and the U.S. partner is enabled to syndicate internationally all of its in-house productions.

However, there are potential pitfalls to U.S.-E.C. joint ventures: (1) methods of dispute resolution and termination must be determined up front before entering into any agreement, and (2) U.S. firms should be aware that European copyright laws differ in their scope of protection from U.S. laws and even among member countries themselves.

One important aspect of E.C. law is the principle of Community Exhaustion. By marketing a product in a part of the E.C. with less copyright protection, the copyright holder gives up the possibility of relying on greater copyright protection for that product in another part of the E.C. where it is marketed later.

Another important difference is that E.C. countries commonly grant copyright protection over "moral rights." Thus, there is not usually only one author of a work. Several members of a production team often end up holding a copyright over the work. Rebroadcast and derivative product rights will depend upon permission from all of these holders, which can become quite cumbersome. The author suggests that the joint venture should seek a waiver of the various copyright holders' rights to the extent allowed by law before proceeding.

Thus, despite the recent Directive limiting U.S. access to European markets, U.S. media firms can still make substantial inroads via co-productions with E.C. partners. Carefully struc-

2. Evaluation of the Syndication and Financial Interest Rules, Report and Order, 6 FCC Rcd. 3094 (1991).

tured joint ventures remain one of the few alternatives which allow U.S. firms to retain their share of world media markets.

M.G.

Jeffrey Kowall, ***Foreign Investment Restrictions in Canadian Television Broadcasting: A Call for Reform*****,** 50 U. TORONTO FAC. L. REV. 61 (1992).

The Canadian Radio-Television Telecommunications Commission (CRTC) may grant a broadcasting license only if foreigners own no more than twenty percent of the enterprise and all the corporate officers are Canadian. Further, the CRTC may refuse to grant a license if it considers that such grant will not be in the public interest[1]. Pursuant to 1991 Broadcasting Act[2] § 26(c), the Governor in Council issues directions to the CRTC with respect to the classes of applicants who should be denied a broadcasting license.

Since the 1920's, the fear of American cultural domination spurred the Canadian government to enlist the Canadian broadcasting industry in the task of promoting Canadian culture and national unity. When the numbers of privately owned broadcasters sharply increased in the 1950's, Canada enacted its first foreign investment restriction. The 1968 Broadcasting Act further tightened the restrictions, giving them their present form as embodied in the language of the 1991 Act. The direction currently in force was issued in the seventies when xenophobic sentiments peaked.

The author points out that, ironically, the 1968 Act was styled after the U.S. Communications Act of 1934. However, this imitation is inappropriate. The Communications Act was born in the thirties out of the fear that enemy propaganda will have a hypnotic effect on American people. Hence, a rigid

1. Direction to the CRTC (Eligible Canadian Corporations), C.R.C., ch. 376 (1978).

2. Broadcasting Act, ch. 11, 1991 S.C. 117 (Can.).

framework of heavy restrictions was necessary to protect against foreign investment in the broadcast media. On the other hand, since the Canadians only wish to strengthen their cultural sovereignty and national unity, they require a more flexible framework. Otherwise, Canadian broadcasters' ability to raise sufficient capital is unjustifiably restricted.

Political, technological, and commercial change brings to the forefront the question of how to treat foreign investment in the broadcasting industry. In the political arena, Canadian cultural protectionism survives in the environment of world-wide growth of international direct investment. Pursuant to the Canada-United States Trade Agreement Implementation Act,[3] even such economically vital industries as banking were substantially opened to foreign investment. Nevertheless, despite both American and Canadian objections, the Canadian government maintains its popular policy of protecting cultural industries like broadcasting. In contrast, the European Community is liberalizing the trade in services (which includes telecommunication and, potentially, broadcasting).

On the technological front, Canadian tolerance for foreign investment in the broadcasting industry will be tested once again when the telecommunications industry, which enjoys substantial foreign investment, will enter the broadcasting field.

Also on the technological front, Canadian broadcasters will need additional capital to face challenges posed by new technologies of direct broadcast satellite (DBS) and high definition television (HDTV). Canadian broadcasters will need capital to produce high quality programming to compete with American DBS service that will spill into Canada if and when it begins to operate. In addition, when HDTV does arrive, broadcasters wishing to remain competitive will need capital to upgrade much of their broadcasting equipment. Broadcasters can only get this infusion of capital from abroad.

Finally, the logic of restricting foreign investment to strengthen national unity and cultural sovereignty should be examined. For example, Canada is in a state of greater disunity today than ever before, even though broadcasting has remained in Canadian hands. Moreover, the relationship between owner-

3. Ch. 65, 1988 S.C. 1999 (Can.)

ship and content has not been empirically studied in Canada because Canadians own all licenses. In America, however, foreign owned media giants are not criticized for imposing foreign ideals on American audiences.

Therefore, the author suggests that the Broadcasting Act be reformed to increase the cap on foreign investment to somewhere between thirty and forty-nine percent, while maintaining CRTC's discretionary power to block transfers that are against public interest. Alternatively, the author suggests that foreign investment in broadcasting licenses be regulated under the more flexible Investment Canada Act.[4] In any case, a reduction in foreign investment restrictions should be accompanied by a complementary increase in content regulation. This is necessary to ensure a satisfactory level of Canadian programming regardless of the nationality of ownership.

An element of national pride is involved as Canadians seek to maintain a viable television broadcasting industry. However, as political, commercial and technological change sweeps through Canada's landscape, old viewpoints and ideologies, including those underlying Canada's broadcasting policies, will need to be re-examined and adjusted to meet the challenges of twenty-first century.

A.S.

Mark C. Rahdert, ***The First Amendment and Media Rights During Wartime: Some Thoughts After Operation Desert Storm***, 36 VILL. L. REV. 1513 (1991).

During military confrontations, the First Amendment rights of freedom of speech and of free press come into conflict with the government's interest in national security. This article addresses the extent to which the government should interfere

4. Ch. 20, 1985 S.C. (Can.).

with press coverage of wartime affairs. With specific references to recent events in the Persian Gulf War, Rahdert concludes that government interference, in terms of both censorship and denying media access to military affairs, has become too great. However, the author additionally outlines the difficulties of a judicial resolution to the balancing of free speech and national security.

Historically the media and military cooperated in balancing the interests of free speech and national security. The government voluntarily disclosed pertinent information in exchange for the press' voluntary submission to systematic censorship. However, the article notes that since the Vietnam war, this negotiation has ended.

While acknowledging that some degree of military censorship is necessary to protect lives and military strategy, Rahdert concludes that the government's interference with free press must be checked. There is a danger that the government may censor in order to control public opinion and, thus, disturb the democratic check on the government. The article examines the government's actions in Operation Desert Storm and concludes that the military used too broad of a stroke in its censorship of the media, controlling even the style of media presentations to the public.

The article also discusses the judicial checks against such censorship. Prior restraints of publication conflict with the principles of the First Amendment. However, courts have conceded that there are times when censorship is permissible even though the amendment facially appears absolute in its protection against government interference. *New York Times Co. v. United States*[1] is the only Supreme Court decision on a government attempt to enforce wartime prior restraints. Rahdert notes that although the Court denied a government request to enjoin publication of classified documents, based on the pretext of national security, a majority of the Court left open the possibility that the publication of news may be enjoined in some circumstances. Thus, according to the article, the courts have left wide discretion in the hands of federal officials.

The next issue addressed is the extent to which government

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1. 403 U.S. 713 (1971).

should control media access to wartime affairs. Rahdert presents two opposing views of whether access should be a First Amendment right. The first view is that access is not clearly "speech" under the First Amendment. The second argues that for free speech to exist there must be an attendant right to the wherewithal of speech — that "speech" itself implies "well-informed speech."

Rahdert also analyzes the control that the government has exercised over the press since Vietnam. During the Panama and Grenada engagements, the government basically denied access to the press until the conflicts were over. The media's complaints after Grenada prompted the Pentagon to address the question of media access. The result was the Sidle Report and its proposal of a "pool" system to guarantee the press some coverage, and yet to give the military some power to limit press involvement. Rahdert examines the government's control over media access in Operation Desert Storm where such a "pool" system was used. Reporters from major media networks and publications that had a long term presence covering military operations were selected and then escorted to designated sites.

The courts have thus far avoided determining any right of media access to wartime affairs. In *Flynt v. Weinberger*[2] and in *Nation Magazine v. United States Department of Defense*,[3] the media challenged the government's policy on press access in Grenada and in the Persian Gulf, respectively. Due to the rapid completion of these military conflicts, the court in each of these cases dismissed the challenges on justiciability grounds. By the time the court heard each case, the invasion was over and the restrictions had been lifted.

However, the courts have recognized a right of media access in another context. In *Richmond Newspapers, Inc. v. Virginia*[4] the Supreme Court recognized a First Amendment right of access to criminal trials. Rahdert, comparing *Richmond Newspapers* with access to wartime information, concludes that there is at most an argument for a qualified right of access to military affairs.

The article concludes that some media access should be al-

2. 762 F.2d 134 (D.C. Cir. 1985).
3. 762 F. Supp. 1558 (S.D.N.Y. 1991).
4. 448 U.S. 555 (1980).

lowed and that the government should be allowed to regulate the "time, place and manner." On the other hand, Rahdert finds that government discretion over access and, especially, over censoring must be limited. However, the article additionally notes that a forced judicial involvement is not necessarily best because the military's discretion over censorship will be more narrowly defined, and the court will be unwilling to find a constitutional right of media access. Rahdert encourages the media and military to "settle out of court."

Y.D.