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Phillip Palmer

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# Cellular Mobile Radio Telecommunications: Regulating an Emerging Industry

*Philip Palmer McGuigan, David M. Connors, and  
Kenneth L. Cannon II\**

## I. INTRODUCTION

Technological advances in the field of radio telecommunications have prompted the Federal Communications Commission (FCC or Commission) to embark on an ambitious program to license providers of cellular mobile radio telecommunications (CMRT) service in every major metropolitan area of the United States. Traditional mobile radio telephone systems have been unable to serve a large number of subscribers; available technology also limits the quality and consistency of voice transmission the systems could provide. Newly developed CMRT equipment utilizes computer coordinated reuse of multiple radio channels throughout a broad geographical area to provide an integrated, contiguous radio telephone network. A fully developed CMRT system can potentially serve a larger number of subscribers over a wider area with more consistent transmission quality than existing mobile radio telephone service. Increased miniaturization of electronic components will help make the CMRT handset much more portable. Unlike current mobile phone service, the nationwide implementation of standardized equipment and billing procedures will permit a CMRT subscriber from one city to place calls on the subscriber's portable handset even when located in a distant city, as long as the distant city is served by a cellular system. Notwithstanding these advantages, CMRT promises to be more affordable than existing mobile telephone service.

To assure rapid development of CMRT, and to guarantee

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\* Mr. McGuigan, B.A., Brown University, J.D., University of Minnesota, is a partner in the firm of LeBoeuf, Lamb, Leiby & MacRae and Chairman of the Board of Directors of Cellular Systems Corporation, a nonwireline applicant for a cellular mobile radio telecommunications license in Salt Lake City, Utah. Mr. Connors, B.A., Yale University, J.D., Brigham Young University, and Mr. Cannon, B.A., M.A., J.D., Brigham Young University, are associates with the firm of LeBoeuf, Lamb, Leiby & MacRae.

the uniform availability of its unique technological advantages, the FCC has blocked state public service commissions from regulating several key aspects of the nascent industry. The FCC has already made a finding as to the public need for CMRT service, and has decreed that cellular licenses will not be denied because of any potential adverse impact on existing providers of mobile telephone service. Furthermore, the FCC has already determined the technical standards for cellular service. As a result the FCC has clearly assumed primary control over the licensing procedure used to select new CMRT providers. State commissions will have little authority over either the criteria used to determine the successful applicant or the timetable under which cellular service will be commenced.

The FCC's preemption of these important areas of state regulation raises fundamental questions regarding the source and extent of its authority to regulate CMRT in lieu of state commissions. In the wake of the preemption, state commissions must also assess their own remaining authority to regulate CMRT and, in the context of the newly announced federal regulatory scheme, develop state policies of CMRT control designed to advance local interests.

In addition to the nucleus of unanswered questions surrounding federal preemption, significant antitrust issues have emerged as the FCC has developed its scheme for organizing and regulating the new CMRT industry. Given the finite spectrum available to CMRT providers, all parties have realized that entry into the CMRT market will be severely limited. Fierce competition for available markets has developed between providers of current mobile radio telephone service (radio common carriers or RCCs), existing telephone companies (wireline carriers), and others (nonwireline carriers). However, the FCC has organized the competition for licenses and the eventual structure of the CMRT industry in a way that inherently favors wireline applicants. It is possible that the FCC's regulatory scheme and the actions of license applicants could therefore be challenged on several antitrust grounds.

This Article traces the development of mobile radio telephone technology from infancy to the recent cellular breakthroughs. The corresponding evolution of federal regulation is also chronicled, and the current CMRT regulation is outlined. An examination of the legal issues raised by present FCC policies suggests that the federal preemption is consistent with the

FCC's authority and will probably survive any court challenge. However, the resolution of outstanding antitrust issues is not as clear. In the wake of these concerns, the Article concludes with an examination of present and future state regulation of cellular telecommunications.

## II. HISTORICAL DEVELOPMENT OF FCC REGULATION OF MOBILE AND CELLULAR TELEPHONE SYSTEMS

### A. *Early Developments in Technology and Regulation of Mobile Telephone Service*

By the end of World War II, radio technology had been developed for law enforcement, maritime, and military uses to the point that a commercial public mobile telephone system was feasible.<sup>1</sup> In 1946, the first commercial mobile telephone system was established in St. Louis by American Telephone and Telegraph Co. (AT&T or Bell). In 1947, AT&T asked the FCC to allocate sufficient frequency spectrum to facilitate a higher capacity mobile system.<sup>2</sup> Two years later, AT&T submitted a more sophisticated petition for sufficient bandwidth to meet rising public demand for mobile telephone service.<sup>3</sup> The FCC was reluctant to allocate large quantities of spectrum to mobile telephone systems because of anticipated conflicts with industrial frequencies.<sup>4</sup> Instead of granting AT&T's petition, the FCC attempted to accommodate the public demand by authorizing nonwireline radio common carriers to compete with the mobile system operated by AT&T.

As the lower frequency levels filled, providers of this "Domestic Public Land Mobile Radio Service" sought an allocation of spectrum in the higher 470-500 MHz range, competing with television for these frequencies. Although the Commission considered mobile telephone service "socially valuable" with compelling needs, it awarded the whole of this band to the bur-

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1. Young, *Advanced Mobile Phone Service: Introduction, Background, and Objectives*, 58 BELL SYS. TECHNICAL J. 1, 2-3, 5-6 (1979).

2. *Id.* at 3, 5-6. The St. Louis system was an "urban" system meant to be used in the city. In 1947 a "highway" system was established between New York and Boston to be used by highway travelers. *Id.* at 3.

3. *Id.* at 6; General Mobile Radio Service, 13 F.C.C. 1190, 1212 (1949).

4. General Mobile Radio Service, 13 F.C.C. 1190, 1212 (1949). Since 1949 the FCC has generally allocated equivalent amounts of spectrum for public mobile services to wireline and nonwireline common carriers.

geoning television industry in 1951.<sup>5</sup> The Commission urged the mobile telephone industry to deal with lack of spectrum by developing more efficient techniques of operation.

During the next seventeen years substantial advances were made in mobile telephone technology. For example, in 1964, an Improved Mobile Telephone System was introduced which eliminated the need to manually depress a switch to transmit, and which boasted automatic dialing, eliminating the necessity of making all calls through a mobile operator.<sup>6</sup> Yet, the number of channels allocated to public mobile service was so small that even improvements such as these made little practical difference. It was not unusual for a mobile subscriber to wait several minutes for a free channel on which to make a call. The limited available spectrum also severely restricted the number of customers that could subscribe to a public mobile telephone service. In some large metropolitan areas there were more people on the waiting list than there were actual subscribers, despite the occasionally poor reception and relatively high cost of the service.<sup>7</sup>

In 1968 the FCC established Docket No. 18,262, formally recognizing the public demand for a mobile telephone system that offered high quality service, a capacity for a large number of users, and low cost to consumers.<sup>8</sup> Commission staff studies completed in 1968 had analyzed the possibility of providing frequency relief to the mobile industry through the utilization of frequencies above 470 MHz. After reviewing these studies, the Commission was encouraged by the potential of 806-960 MHz band for use in mobile service.<sup>9</sup> The 806-890 MHz range had earlier been allocated to mobile telephone's traditional rival for

5. Amendment of Section 3.606 of the Comm'n's Rules & Regulations, Fourth Report of Comm'n & Order, 41 F.C.C. 131, 133-35, 137-38 (1951).

6. Young, *supra* note 1, at 3-4.

7. See, e.g., An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Notice of Inquiry and Notice of Proposed Rule Making, 14 F.C.C.2d 311, 312-15 (1968) [hereinafter cited as 1968 Notice of Inquiry]; J. BAIN, W. HIMSWORTH, & S. BRISTOL, CELLULAR MOBILE RADIO TELECOMMUNICATIONS SERVICE, APPLICATIONS FOR THE TOP 30 MARKETS 2 (1982) (Prepared by Lehman Brothers, Kuhn, Loeb Research) [hereinafter cited as THE TOP 30 MARKETS]; J. BAIN, W. HIMSWORTH, & S. BRISTOL, CMRS: CELLULAR MOBILE RADIO TELECOMMUNICATIONS SERVICE, UPDATE ON AN EMERGING TECHNOLOGY 1, 4 (1982) (Prepared by Lehman Brothers, Kuhn, Loeb Research) [hereinafter cited as CMRS]; Ware, *The Competitive Potential of Cellular Mobile Telecommunications*, PUB. UTILS. FORT., Feb. 3, 1983, at 28, 29, 34 nn.1 & 3; *Cellular Radio*, BROADCASTING, June 7, 1982, at 38, 39.

8. 1968 Notice of Inquiry, *supra* note 7, at 312. Docket No. 18,262 also inquired into allocation of frequency to private land mobile radio, not of concern in this study.

9. See 1968 Notice of Inquiry, *supra* note 7, at 314-17.

frequency spectrum, the television industry, and at the time constituted the highest 13 channels in the UHF range. It appeared, however, that UHF television was not developing as rapidly as had been anticipated, and the FCC decided that coequal sharing of 806-890 MHz band between UHF and public land mobile telephone should be authorized.<sup>10</sup> AT&T asserted that it could provide quality mobile service to 8,000 customers in a given area with an allocation of 75 MHz within the 806-960 MHz band. The FCC apparently agreed because it proposed reserving 75 MHz of spectrum for public land mobile telephone.<sup>11</sup> The Commission delayed deciding whether RCCs, as nonwireline carriers, would be allowed to apply with wireline carriers such as AT&T for the use of the allocated spectrum.<sup>12</sup>

The Commission was not unanimous in its determination that a high-capacity public mobile system was needed. Commissioner Robert E. Lee found the Commission's allocation of so much spectrum to mobile telephone systems frivolous and felt that such an allocation would simply create demand for a new status symbol: "a telephone for each family car." Commissioner Lee preferred to leave the frequency in the hands of the television industry.<sup>13</sup>

Nonetheless, the majority of the Commission was now firmly committed to the establishment of a high-capacity public mobile telephone system. In 1970, the FCC issued its *First Report and Order and Second Notice of Inquiry* in Docket No. 18,262.<sup>14</sup> The Commission held to its original allocation to mobile telephone systems of 75 MHz in the 806-960 MHz band.<sup>15</sup> More importantly, the *Report and Order* announced a new cellular mobile technology being developed by AT&T. This cellular telecommunications system was heralded by AT&T as "an ultimate high capacity mobile system capable of accommodating land vehicles, aircraft and, to a limited extent, maritime vessels."<sup>16</sup> Additional system studies were necessary to determine if the new cellular technology would really revolutionize the public

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10. *Id.* at 314, 316.

11. *Id.* at 317.

12. *Id.* at 317-18.

13. *Id.* at 320-21.

14. An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, 19 RADIO REG. 2d (P & F) ¶ 52.106, at 1663 (1970) [hereinafter cited as 1970 Order].

15. Public land mobile uses were to take precedence over UHF television facilities in the 806-890 MHz range rather than sharing these frequencies coequally.

16. 1970 Order, *supra* note 14, at 1673.

mobile telephone industry as much as AT&T promised it would. By December 1971, AT&T submitted to the FCC a detailed study entitled "High-Capacity Mobile Telephone System—Technical Report"<sup>17</sup> which helped convince the Commission that the future of mobile telephone lay in cellular technology.<sup>18</sup>

### B. Cellular Technology

The basic concept of a cellular system is simple. Rather than attempting to cover a large service area with one or two relatively high-powered transmitters located at prominent elevations as existing mobile systems do, a cellular system employs a number of moderately powered transmitters centered in small geographical areas called cells. Cells are linked by either wire or microwave to a computerized central switching mechanism. All cells in close proximity to one another are assigned a discrete set of channels, and adjoining cells operate on different frequencies.<sup>19</sup>

This cellular design provides several advantages over conventional mobile systems. The central switch is connected into the wireline telephone system as mobile systems have to some degree always been, which allows mobile callers to dial direct to practically anywhere in the world. The discrete allocation of channels coupled with the relatively low-power signal of the transmitters in the cells reduces the potential for interference among mobile callers. Transmission in each cell tends to be more consistent, since the use of multiple transmitters permits the system to be tailored to the terrain. Cellular design thus reduces the likelihood that some parts of the service area will remain in a shadow zone where reception is blocked, as often happens when only one transmitter serves a wide area. Most importantly, cellular design can serve many more subscribers than a conventional mobile radio telephone system. Because adjacent cells operate on different frequencies at low power, the same frequencies can be simultaneously "reused" by callers in nonadjacent cells. Thus larger numbers of callers can use the

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17. Young, *supra* note 1, at 6, 14 n.8.

18. An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Second Report & Order, 46 F.C.C.2d 752, 753 (1974)[hereinafter cited as 1974 Order].

19. For more detailed descriptions of the cellular concept, see CMRS, *supra* note 7, at 12-15, and MacDonald, *Advanced Mobile Phone Service: The Cellular Concept*, 58 BELL SYS. TECHNICAL J. 15, 16-18 (1979).

same finite frequency spectrum.<sup>20</sup> Cells can be further split, enlarging the system's capacity even more.<sup>21</sup>

Although the basic concept of a cellular mobile configuration is rather simple, the technology necessary to put the concept into operation is complex.<sup>22</sup> Establishment of an operative cellular system has required the development of a central switching mechanism employing highly sophisticated computer applications to coordinate the several cells. Other complex technological puzzles had to be solved in the creation of a viable cellular system. For example, allocation of frequencies within the system must be adjusted to meet demand. Assigning each cell an equal and discrete set of channels—which would be the simplest approach—presupposes that demand will be equal in each cell at all hours. This assumption does not correspond to actual use and limits the ultimate capacity of the system. The problem is dealt with either by assigning more channels to cells used more frequently or by incorporating the concept of “frequency agility” into the cellular system. Frequency agility allows all cells to operate on all channels. If all the channels assigned to one cell are being used, that cell can borrow any idle channel normally assigned to another cell. This is all controlled by the central switching mechanism.<sup>23</sup>

Another problem stems from the movement of the mobile or portable<sup>24</sup> phones. As a car travels, it moves out of the range of one transmitter and into the range of another, potentially interrupting service. To solve this difficulty signal strength of the mobile unit is constantly monitored while the unit is in operation; as the unit moves from one cell into the next the central switching mechanism automatically reroutes the call through the appropriate transmitter. This process, known as “frequency hand off,” permits a motorist engaged in a conversation to drive through the cellular service area from one cell to the next and have his or her conversation automatically switched from one frequency to another without any discernible impact on the

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20. CMRS, *supra* note 7, at 13; MacDonald, *supra* note 14, at 16-19.

21. THE TOP 30 MARKETS, *supra* note 7, at 11.

22. One Bell staff member asserts that D.H. Ring of Bell Laboratories had conceived the cellular concept in 1947. Young, *supra* note 1, at 7-8. Apparently, Bell has been working on the concept from that time.

23. CMRS, *supra* note 7, at 14.

24. Fully portable units have already been developed. Commissioner Lee's “telephone for each family car” could well become “a telephone for each businessman's briefcase.”



conversation.<sup>25</sup>

### C. *Developing the Regulatory Framework*

By the time the FCC issued its *Second Report and Order*<sup>26</sup> in Docket No. 18,262 in May 1974, AT&T and other companies involved in the development of telephone technology had submitted comments and reports on progress in cellular technology, and the Commission was able to propose more detailed policies. The FCC reduced the allocation of spectrum for CMRT from 75 MHz to 40 MHz because the information it had been provided indicated that with the improved technology no more spectrum would be necessary to meet anticipated market demand.<sup>27</sup> Twenty MHz of spectrum was held in reserve should CMRT need it. The FCC denied AT&T's proposal to reserve 11 MHz for public air-to-ground cellular telephone service.<sup>28</sup>

Because primarily wireline telephone companies had expressed an interest in developing cellular technology and because the FCC believed that only wireline companies had the technical expertise and financial capability to research and develop the cellular technology, the FCC decided that only wireline companies should be licensed to operate cellular systems.<sup>29</sup> To eliminate the possibility of cross-subsidization between a wireline company's cellular service and its conventional telephone service, the FCC required that each wireline applicant for a cellular license establish a separate company with its own accounts, officers and personnel to operate the proposed cellular system. Finally, the Commission announced its decision to authorize developmental systems to gather data on and determine the needs of permanent cellular systems. The entire 40 MHz au-

25. CMRS, *supra* note 7, at 14-15.

26. 1974 Order, *supra* note 18.

27. *Id.* at 756-57. The Commission believed that by utilizing 40 KHz channeling a cellular system could ultimately serve 105,000 telephone subscribers. New developments in the last 10 years have prompted the Commission to mandate 30 KHz channeling. An Inquiry into the Use of the Bands 825-845 MHz & 870-890 MHz for Cellular Communications Syss., Notice of Inquiry and Notice of Proposed Rulemaking, 78 F.C.C.2d 984, 1004 (1980) [hereinafter cited as 1980 Notice of Inquiry].

28. 1974 Order, *supra* note 18, at 757. Under the AT&T proposal, airline passengers could have placed and received calls from the air. In January 1983, the FCC initiated a new proceeding in which it proposed to allocate 4 MHz of spectrum in the 900 MHz range for air-to-ground public radio telephone service. *Allocation of Spectrum Space to Provide Air-Ground Public Radiotelephone Serv. Proposed*, F.C.C. News, Rep. No. 17,325 (Jan. 21, 1983).

29. 1974 Order, *supra* note 18, at 760.

thorized for cellular systems was made available for the developmental systems, but only one developmental system per market was allowed.<sup>30</sup>

In its final major pronouncement of policy on cellular systems in Docket No. 18,262, issued in March 1975, the FCC made several changes in its regulatory scheme.<sup>31</sup> The Commission was convinced by one commenter's argument that if wireline companies were the only entities that "demonstrably had the resources and expertise necessary to establish 'cellular' radio systems," then authorizing cellular licenses only to wireline applicants would be a superfluous act.<sup>32</sup> As a result, the Commission opened application to both wireline and nonwireline carriers.<sup>33</sup>

The Commission's firm commitment to cellular technology was indicated by its refusal to consider licensing any noncellular type of system in the 40 MHz allocated to Domestic Public Land Mobile Radio Service within the 806-960 MHz band.<sup>34</sup> For the time being, only developmental systems were authorized. It was stipulated at the outset that licensees of developmental systems would be given no comparative advantage in obtaining a permanent cellular license.<sup>35</sup> Requirements for developmental systems were outlined: *inter alia*, developmental systems were to be bona fide cellular systems, fully interconnected with the public wireline telephone network, and able to provide a grade of service comparable to that of a wireline system.<sup>36</sup>

In this proceeding, the FCC also tackled for the first time the problem of deciding among competing applicants. The Commission initially concluded that only one system per market would be authorized on a permanent basis after completion of the developmental programs, but left open the possibility of later changing this approach. To ensure that a cellular system would be put into operation as expeditiously as possible, the Commission announced its intention to utilize a streamlined comparative hearing process in those cases in which there would be competing applicants.<sup>37</sup>

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30. *Id.* at 760-61.

31. An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Memorandum Opinion & Order, 51 F.C.C.2d 945 (1975).

32. *Id.* at 953. Airsignal International Inc. was the commenter.

33. *Id.*

34. *Id.*

35. *Id.* at 953-55.

36. *Id.*

37. *Id.* at 954. Four months later, in July 1975, the FCC refused to reconsider its

A number of RCCs and other interested parties were dissatisfied by the FCC's scheme and appealed the Commission's orders in Docket No. 18,262 to the United States Court of Appeals for the District of Columbia Circuit. In January 1976 that court issued *National Association of Regulatory Utilities Commissioners v. FCC (NARUC v. FCC)*, sustaining the regulatory scheme announced by the Commission.<sup>38</sup> The court, however, did express strong reservations about possible antitrust issues raised by the regulations. It upheld the regulations only on a provisional basis: "In light of the Commission's broad discretion in experimentation and encouragement of the broader use of radio, we conclude that those [substantial anticompetitive] effects are *at present* too speculative and distant in time to constitute this part of the Order a breach of discretion."<sup>39</sup>

With the regulatory scheme in place and judicially upheld, the Commission began reviewing applications for developmental systems. In March 1977 the FCC awarded a developmental license to AT&T subsidiary Illinois Bell Telephone to operate a system in the Chicago area.<sup>40</sup> Later that year the Commission licensed American Radio Telephone Service (ARTS), a Motorola subsidiary, to construct a developmental system in the Washington, D.C.-Baltimore area.<sup>41</sup> Although other applications for developmental systems were received,<sup>42</sup> no other developmental licenses were issued.

#### D. Current Regulatory Framework

In a series of administrative proceedings, the Commission has continued to refine the policies and procedures which will govern the CMRT industry. Building on the previously developed policies, and responding to the feedback received after operation of the developmental systems, the Commission has now announced the basic structure of the CMRT industry, the extent

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stated regulatory approach and terminated Docket No. 18,262. An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, Memorandum Opinion & Order, 55 F.C.C.2d 771 (1975).

38. 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

39. *NARUC v. FCC*, 525 F.2d at 647 (emphasis added).

40. *Illinois Bell Tel. Co.*, 63 F.C.C.2d 655 (1977), *aff'd sub nom. Rogers Radio Communication Servs., Inc. v. FCC*, 593 F.2d 1225 (D.C. Cir. 1978).

41. *American Radio Tel. Serv. Inc.*, 66 F.C.C.2d 481 (1977).

42. *Inquiry into the Use of Certain Frequency Bands for Cellular Communications Sys.*, Report & Order, 46 Fed. Reg. 27,655, 27,656 & n.8 (1981) [hereinafter cited as *May 1981 Order*].

to which state regulation has been preempted by federal regulators, and the process to be used in permanent licensing.

### 1. *Industry structure*

In an effort to introduce a higher degree of competition, the FCC has decided to license two systems per market with 20 MHz of spectrum allocated to each system.<sup>43</sup> Changing its earlier views, the FCC has concluded that one system to a market is unnecessarily restrictive. This reconsideration was largely due to the fears expressed by the *NARUC* court<sup>44</sup> that AT&T might be given a nationwide monopoly in cellular service, but was also premised on the realization that companies other than AT&T are fully capable of designing, constructing and operating cellular systems. However, the Commission wanted to avoid the unnecessary and economically inefficient duplication of CMRT systems that would accompany unrestricted entry. Its decision to license two cellular systems per market allows some of the benefits of competition without creating the confusion that would be caused by open entry.<sup>45</sup>

Competition for the two available licenses in each market is rigidly structured. One license in each market is reserved for a wireline company; the other for a nonwireline carrier, including nonwireline RCCs.<sup>46</sup> By allocating one 20 MHz band each to wireline and nonwireline carriers, the Commission has followed its tradition of allocating equal bands to competing entities.<sup>47</sup> Like most other aspects of its announced regulatory policy, this bifurcated spectrum allocation represents a compromise between other extreme options proposed by interested parties. The FCC originally intended to exclude all nonwireline carriers from the CMRT market; after concluding that nonwireline carriers were technologically capable of designing, building, and operating cellular systems, the FCC considered whether wireline

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43. 1980 Notice of Inquiry, *supra* note 27, at 991.

44. 525 F.2d 630.

45. The Commission also authorized cellular licensees to offer dispatch service, which led many RCCs to argue that this would have an anticompetitive effect on the one-way dispatch industry. May 1981 Order, *supra* note 42, at 27,661-62.

46. *Id.* at 27,664.

47. See, e.g., Amendment of Part 21 of the Comm'n's Rules with Respect to the 150.8-162 Mc/s Band to Allocate Presently Unassignable Spectrum to the Domestic Pub. Land Mobile Radio Serv. by Adjustment of Certain of the Band Edges, 12 F.C.C. 2d 841, *reconsideration denied*, 14 F.C.C.2d 269 (1968), *aff'd sub nom.* Radio Relay Corp. v. FCC, 409 F.2d 322 (2d Cir. 1969).

companies should be allowed to obtain cellular licenses at all. The FCC concluded that fewer wireline companies would apply for cellular licenses than nonwireline companies, thus reducing delays caused by hearings. It also determined that wireline companies could more easily put cellular systems into operation. Because of the public interest in getting a system up and running as soon as possible, the Commission decided that it would allow wireline common carriers to apply for one cellular license in each market.

The Commission has decided not to institute the rule that it has established in other radio telecommunications proceedings<sup>48</sup> which allowed any wireline company to apply for a wireline frequency in any market. Consequently, a wireline applicant can apply for a cellular license only in those areas in which it or an affiliate operates.<sup>49</sup>

The Commission has recognized the substantial possibility of anticompetitive problems triggered by its structuring of the CMRT industry, but believes the public interest in receiving cellular service outweighs these problems. It argues that authorization of two systems per market fosters competition by preventing any one company from monopolizing the cellular industry. The Commission also points out that antitrust considerations are not the only factors it must examine in making its determination of public interest.<sup>50</sup> It is in the public interest to get a system operational as soon as possible, and the Commission feels that wireline companies are in a position to establish operational systems before nonwireline companies.<sup>51</sup> However, to mitigate anticompetitive difficulties a number of safeguards are built into the regulatory structure.<sup>52</sup> The Commission has established a two-year sunset provision on separate frequency allocations for wireline and nonwireline companies.<sup>53</sup> After two years, any qualified company can apply for any available cellular license. A

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48. See *Bonduel Tel. Co.*, 68 F.C.C.2d 497 (1978).

49. May 1981 Order, *supra* note 42, at 27,663 & n.56.

50. This view has been judicially upheld in *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953), and *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974).

51. May 1981 Order, *supra* note 42, at 27,660.

52. *Id.* at 27,660, 27,662-63.

53. Public Mobile Radio Services; Cellular Communications Syss., 47 Fed. Reg. 10,018, 10,023 (1982) (to be codified at 47 C.F.R. § 22,903(b)) [hereinafter cited as March 1982 Order]. The sunset period was decreased to two years from the five originally proposed because of the large number of statements received by the Commission that criticized the separate allocation scheme.

complementary provision allows a challenge to the renewal of a cellular system after five years.<sup>54</sup>

At least one nonwireline applicant has petitioned the FCC not to issue a construction permit to the sole wireline applicant in the same service area because of the severe damage the wireline's headstart would cause to the nonwireline applicants.<sup>55</sup> The FCC has announced that if a nonwireline applicant can show that early entry into the market by a wireline licensee would not be in the public interest, then the Commission will consider deferring action on the wireline license.<sup>56</sup> However, the FCC has refused to establish a stricter policy to deal with this problem.

The Commission has scaled down its previously announced requirement that wireline applicants establish separate entities to operate cellular systems. The Commission has determined that only AT&T must continue to comply with this regulation since only AT&T is in a position to have a substantial anticompetitive effect on the market, and since some smaller wireline companies would be greatly hurt if required to establish separate cellular companies.<sup>57</sup>

As an additional precaution the Commission had required that wireline companies be willing to interconnect any competing cellular system into the conventional telephone system.<sup>58</sup> To foster competition in the equipment supply market, cellular licensees are permitted to manufacture cellular equipment.<sup>59</sup> And, although the Commission does not know whether a resale market in cellular service will be established, the Commission has decided to allow resale of cellular services. Resale has played an important part in conventional telephone service since it has been allowed in other sectors of the telephone industry, and the Commission concluded that resale would potentially deter price discrimination in cellular service.<sup>60</sup>

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54. The five-year term of the initial license was set by the same order that established the original five-year sunset period. May 1981 Order, *supra* note 42, at 27,664. The March 1982 Order, *supra* note 53, which reduced the sunset period from five years to two, made no mention of any reduction in the term of the initial license.

55. See *GENCOM Calls for FCC to Rule on Cellular Headstart in Phoenix*, *TELECOM NETWORK OF AM. BULL.*, Dec. 24, 1982, at 3, 3-4.

56. May 1981 Order, *supra* note 42, at 27,664.

57. March 1982 Order, *supra* note 53, at 10,025-27 (to be codified at 47 C.F.R. § 22,901).

58. *Id.* at 10,028 (to be codified at 47 C.F.R. § 22,912(a)(9)).

59. May 1981 Order, *supra* note 42, at 27,666.

60. See *generally* Regulatory Policies Concerning Resale & Shared Use of Common Carrier Services & Facilities, Report and Order, 60 F.C.C.2d 261, 298-99 (1970), *recon-*

## 2. Preemption

Central to the Commission's decision to oversee the operation of CMRT is its determination that common carrier mobile telephone services "have an important role to play in our national telecommunications policy planning."<sup>61</sup> 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.<sup>62</sup>

## 3. Licensing process

To facilitate expeditious and orderly evaluation of applications, the Commission has decided to stagger the submission of applications for permanent cellular licenses. Cellular market areas are organized according to census Standard Metropolitan Service Areas (SMSAs) and combinations of these as ordered by the FCC. The SMSAs are divided into blocks of thirty, according to the relative importance and market potential of the area.<sup>63</sup>

Applications for the thirty most populous SMSAs were due ninety days after publication in the Federal Register of the Commission's March 1982 Order in *Public Mobile Radio Ser-*

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*sidered* 62 F.C.C.2d 588 (1977), *aff'd sub nom.* AT&T v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Note, *Resale and Sharing of Private Line Communications Services: A.T.&T. Restriction and FCC Regulation*, 61 VA. L. REV. 679 (1975).

61. 1980 Notice of Inquiry, *supra* note 27, at 997.

62. *Id.* at 997-99.

63. See Public Mobile Radio Services; Use of Specific MHz Bands for Cellular Communications Sys., 47 Fed. Reg. 50,697, 50,698 (1982) [hereinafter cited as November 1982 Final Rule]; Use of Certain MHz Bands for, 2nd Amendment of the Comm'n's Rules Relative to Cellular Communications Sys., *id.* at 32,537, 32,538 [hereinafter cited as July 1982 Final Rule]; An Inquiry into the Use of the Bands 825-845 MHz & 870-890 MHz for Cellular Communications Sys., Memorandum Opinion & Order on Further Reconsideration, 90 F.C.C.2d 571, 580 app. B (1982). Each applicant must define the Cellular Geographic Service Area (CGSA) within the SMSA that it intends to serve. A licensee must serve at least 75% of the CGSA within three years of the effective date of its construction permit. March 1982 Order, *supra* note 53, at 10,030 n.44; May 1981 Order, *supra* note 42, at 27,671.

ices; *Cellular Communications Systems*.<sup>64</sup> On June 7, 1982, the Commission had received so many<sup>65</sup> applications for cellular licenses in the first thirty SMSAs that it pushed back its overly optimistic deadlines for less populous markets. Instead of opening up application for all other SMSAs after completion of filings for the first thirty, the Commission established a November 8, 1982, filing deadline for markets thirty-one to sixty.<sup>66</sup> Applications for markets sixty-one to ninety were due on March 8, 1983.<sup>67</sup>

The FCC will begin accepting applications for all SMSAs other than the first ninety on December 1, 1983.<sup>68</sup> Instead of adopting a date-certain filing as in the first ninety markets, the Commission will follow its more usual procedure.<sup>69</sup> After one application for a particular license is received and put on public notice, competing applicants will generally have sixty days from the date of public notice in which to file.<sup>70</sup>

Applicants are required to submit detailed information about their qualifications to provide competent cellular service. Applicants must show that they are financially capable of funding the construction and first year's operating expenses of a cellular system.<sup>71</sup> They must present information on their manage-

64. March 1982 Order, *supra* note 53, at 10,030.

65. The Commission received a total of 142 applications from nonwireline companies in the top 30 markets. THE TOP 30 MARKETS, *supra* note 7, at 124-25.

66. July 1982 Final Rule, *supra* note 63, at 32,538.

67. November 1982 Final Rule, *supra* note 63, at 50,698. The deadline for markets 61 through 90 remained March 8, 1983, in spite of the huge number of nonwireline applications submitted for markets 31 through 60. In some of the latter markets, there are as many as 20 applicants. An average of 11 applications have been filed for the nonwireline cellular license in markets 31 through 60, *FCC Accepts 396 Cellular Applications for Markets 31-60*, *TELOCATOR NETWORK OF AM. BULL.*, Nov. 12, 1982, at 1, 1-2 [hereinafter cited as *396 Applications for Markets 31-60*]; *A Report on the November 8, 1982, Filings for Markets 31-60 at the FCC*, *id.*, Nov. 19, 1982, at 1-149.

68. See "Cellular Application Date for Remaining Markets Delayed to December 1 (C.C. Docket No. 79-318)," *F.C.C. News*, Rep. No. 17,453 (Apr. 19, 1983). The date was postponed from June 7, 1983 because of the large number of applications. *Id.* See also November 1982 Final Rule, *supra* note 63, at 50,698 (original designation of June 7, 1983).

69. The FCC adopted the date-certain filing for the first 90 markets to prevent "one-upsmanship" among competing applicants. March 1982 Order, *supra* note 53, at 10,031.

70. 47 C.F.R. § 22.31(b)(2)(1981). The Commission may take final action before the expiration of the 60-day period. Thus, to guarantee consideration of its application, a potential competitor should file within 30 days after public notice, and must file at least one business day prior to the date on which the Commission takes final action. *Id.*

71. March 1982 Order, *supra* note 53, at 10,037 (to be codified at 47 C.F.R. § 22.917(a)).



rial expertise in order to demonstrate that they are capable of operating a cellular system. They are also required to present technical designs for a truly cellular system utilizing equipment approved by the FCC in order to ensure nationwide compatibility of the system.<sup>72</sup>

The Commission has established a streamlined comparative hearing process to select successful licensees out of the deluge of applicants on the basis of its announced financial, technical, and managerial criteria.<sup>73</sup> The postapplication process is generally the same for applications in all SMSAs, except that nonwireline applicants for the first thirty markets were required to submit their direct cases with their applications.<sup>74</sup> As soon as possible after the submission of the applications, the Commission places on public notice all applications meeting the threshold qualifications outlined above. Interested persons in all markets have thirty days to submit petitions to deny. Replies to these petitions must be submitted within fifteen days after the petitions are due. In the case of all SMSAs below the top thirty, affirmative direct cases are due ninety days after announcement of public notice for those applications. The Commission will then publish a hearing designation order as soon as practicable after filing of replies to petitions today for the first thirty SMSAs and, in the case of the rest of the markets, after submission of direct cases.

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72. 47 C.F.R. § 22.913 (1981).

73. May 1981 Order, *supra* note 42, at 27,666-68. This expedited hearing procedure meets the rather modest comparative hearing requirements of *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945). The Commission earlier toyed with the idea of using a more streamlined hearing process, with the licensees to be chosen in a lottery in which otherwise equally qualified applicants would participate. 1980 Notice of Inquiry, *supra* note 27, at 1000-02. In a dissenting opinion Judge Leventhal of the United States Court of Appeals for the District of Columbia Circuit stated that he was prepared to sustain a decision made by an administrative agency through use of a lottery, provided parties were equally qualified and the "ground rules" were known in advance. *Star Television, Inc. v. FCC*, 416 F.2d 1086, 1095 (D.C. Cir.) (Leventhal, J., dissenting), *cert. denied*, 396 U.S. 888 (1969). Commissioner Robinson of the FCC expressed similar sentiments in *Cowles Florida Broadcasting, Inc.*, 60 F.C.C.2d 372, 444-45 (1976) (Robinson, Comm'r, dissenting). To the relief of many applicants, in October 1982 the Commission reaffirmed its decision not to utilize lottery procedures because of its belief that comparative hearings constitute the best procedure for determining the most qualified CMRT applicants. Amendment to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings Second Notice of Proposed Rulemaking, 47 Fed. Reg. 45,046, 45,047-48 (1982) [hereinafter cited as October 1982 Notice (Lottery)].

74. March 1982 Order, *supra* note 53, at 10,030-31; July 1982 Final Rule, *supra* note 63, at 32,538, 32,541.

Following publication of the hearing designation order, interested parties have ten days to file notices of appearance. Thirty days after the order is published, written rebuttal cases are due. At this point the presiding officer can schedule an evidentiary hearing session at which each applicant has the opportunity to present materials supporting its previously circulated direct and rebuttal cases. Competing applicants will also have the opportunity to lodge their objections. After accepting exhibits into evidence, the judge can entertain motions to cross examine and decide whether witnesses should be called for cross examination. When the hearing record is closed the judge can request proposed findings of fact and conclusions of law within thirty days of the final hearing session. Within sixty days of the last pleadings, the judge should issue an initial decision. Parties will then have thirty days to file exceptions to the initial decision. The Common Carrier Bureau could at the time of designation for hearing determine whether exceptions would be taken directly to the Commission or whether they would go to the Review Board.<sup>75</sup> Of course, a final decision of the Commission can be appealed in the courts.

Once the Commission determines which applicants should be granted the wireline and nonwireline licenses, it follows a two-step licensing procedure. A successful applicant is first given a construction permit to build a cellular system. Upon completion of construction, an operating license is awarded.<sup>76</sup> If the Commission decides that it should delay operation of a cellular system operated by a wireline company because of the headstart problem, it will refuse to complete the second step in the licensing procedure, issuance of an operating license.<sup>77</sup> The federal operating license is also contingent upon compliance with non-preempted state regulatory requirements.<sup>78</sup>

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75. *Id.* at 10,031-32.

76. 47 U.S.C. § 319 (1976); 47 C.F.R. § 22.3 (1981). Operating licenses are not automatically granted after completion of construction. All preconditions must be met. *Id.* Construction permits have been issued to AT&T subsidiary Advanced Mobile Phone Service, Inc. in Chicago, Boston, Pittsburgh, and Buffalo. Nonwireline applicants have been designated for comparative hearings in these cities and in Seattle. TELEPHONY, Nov. 1, 1982, at 11, 93; *Common Carrier Bureau Grants AMPS Boston Cellular Application*, TELELOCATOR NETWORK OF AM. BULL., Nov. 26, 1982, at 6 [hereinafter cited as *AMPS Boston Permit*]; *AMPS Gets Cellular Constr. Permit for Pittsburgh*, TELELOCATOR NETWORK OF AM. BULL., Dec. 10, 1982, at 10; *AMPS Gets CP for Buffalo System*, TELELOCATOR NETWORK OF AM. BULL., Dec. 24, 1982, at 7.

77. *AMPS Boston Permit*, *supra* note 76, at 6.

78. 47 C.F.R. § 22.13(b)(2) (1981).

### III. LEGAL ISSUES

The FCC's pronouncements and policies relating to the emerging cellular telecommunications industry raise some very important legal issues that are not easily resolved. Among these, perhaps the most important are the extent of the FCC's authority to preempt state regulation, and the remaining scope of state regulation of CMRT systems. The FCC's actions also raise some troublesome antitrust problems. Whether the Commission and successful licensees can overcome challenges based on these issues will have a significant bearing on the speed with which cellular systems become fully operational.

#### A. *Federal Preemption of State Regulation*

Since CMRT system operators will be providing telephone service to the general public, they will be subject to regulation by state public utilities commissions.<sup>79</sup> As a general matter, state regulation of public utilities has two principal focuses which may vary from state to state. Initially, the state is concerned that entities desiring to act as public utilities within its boundaries be appropriately qualified to do so. In that regard, many state statutes provide that no common carrier or public utility may operate within the state without first obtaining from the appropriate state commission a certificate that present or future public convenience and necessity does or will require the proposed services. This requirement is commonly referred to as the "certificate of convenience and necessity."<sup>80</sup>

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79. The trigger for both entry-level and rate regulation is a determination that a particular entity is a "public utility" subject to the jurisdiction of a state public utilities commission. In Utah, as in many other states, by statutory definition, "[t]he term 'public utility' includes every common carrier . . . , [or] telephone corporation, . . . where the service is performed for, or the commodity delivered to, the public generally." UTAH CODE ANN. § 54-2-1(30) (1953). "Telephone corporation" is defined to include "every corporation . . . owning, controlling, operating or managing any telephone line for public service within this state." *Id.* § 54-2-1(22). "Telephone line" includes "all conduits, ducts, poles, wires, cables, instruments and appliances, and all other real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate communication by telephone whether such communication is had with or without the use of transmission wires." *Id.* § 54-2-1(21).

A CMRT system, as envisioned by the FCC, clearly fits within the definition of "telephone line" set forth above. Accordingly, a corporation establishing and operating a CMRT system will likely be a "telephone corporation" and therefore a "public utility" subject to the jurisdiction of state public utilities commissions.

80. *E.g.*, *id.* § 54-4-25. A recent survey conducted by the National Association of Regulatory Utility Commissioners (NARUC) indicates that approximately three-fourths

In addition to this entry-level regulation, state commissions must monitor rates and other charges made by public utilities operating within their states to ensure that such charges are just and reasonable.<sup>81</sup> State statutes usually require that public utilities file schedules with the state commission showing all rates, tolls, rentals, charges, and classifications to be collected or enforced by the public utility.<sup>82</sup> Beyond this, however, state commissions have broad discretion to determine the extent and nature of their regulation of rates and charges.

In the process of developing its rules with respect to cellular system licensing, the FCC indicated at an early stage its dual concern that state entry-level regulation could significantly delay nationwide implementation of cellular telephone service and could also result in a system that would not be technologically compatible throughout the country.<sup>83</sup> As a result of these concerns the FCC ultimately decided that it would preempt nearly all of the major issues involved in state certificating procedures.<sup>84</sup> Specifically, the FCC made a finding that there is an immediate public need for cellular service on a nationwide basis and "preempted the states from denying state certification based on the number of existing [mobile telephone] carriers in the market or the capacity of existing carriers to handle the demand for mobile services."<sup>85</sup> In addition, the FCC preempted any state determination of technical standards for cellular systems.<sup>86</sup>

Although not a blanket preemption, the net effect of the FCC's action is to relegate states to a very minor role in the entry-level regulation of CMRT systems. The three preempted issues—the determination of public need, the potential impact on competitors, and the proposed system's technical standards—are among the critical areas of concern in any state entry-level regulation. The only other major issue generally involved in obtaining a state certificate of convenience and necessity is a demonstration of financial ability to construct and operate the

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of the states require a certificate of convenience and necessity for radio common carriers. NARUC, 1981 ANNUAL REPORT 594-97.

81. *E.g., id.* § 54-3-1.

82. *E.g., id.* § 54-3-2(2).

83. See 1980 Notice of Inquiry, *supra* note 27, at 997-99.

84. See March 1982 Order, *supra* note 53, at 10,033-34; May 1981 Order, *supra* note 42, at 27,668-69.

85. March 1982 Order, *supra* note 53, at 10,033.

86. *Id.*

proposed facility. Even this issue, however, will be effectively predetermined by the FCC in its application process.<sup>87</sup> In contrast, with respect to rate regulation, the FCC has indicated that it will not interfere with state regulation of CMRT system charges, classifications, practices, services, facilities or regulations for CMRT service.<sup>88</sup>

The FCC's preemption of state entry-level regulation raises two serious questions: whether the FCC has the statutory authority to preempt state regulation in this manner and, if so, whether the FCC is justified in exercising its authority in the context of the cellular licensing process. The FCC's authority to preempt state entry-level regulation of CMRT carriers derives from the congressional grant of jurisdiction to the FCC over matters involving communications in general<sup>89</sup> and radio communications specifically.<sup>90</sup> Although the Commission's preemptive authority may be broad, the issue of the proper scope of that authority has arisen often in the past and will undoubtedly be raised with regularity in the future.

In this order issued May 21, 1981, the FCC cited several cases to support its preemption of state entry-level regulation.<sup>91</sup> While the case law cited by the FCC gives some support to its position, the authority would not necessarily dissuade a potential challenger from raising the issue. For example, in *National Association of Regulatory Utility Commissions v. FCC*,<sup>92</sup> the court upheld the FCC's preemption of state entry-level regulation of Specialized Mobile Radio (SMR) systems.<sup>93</sup> However, a significant factor in the court's decision was its determination that SMR systems are not "common carriers" and accordingly

87. See 47 C.F.R. § 22.917 (1981).

88. March 1982 Order, *supra* note 53, at 10,034.

89. 47 U.S.C. §§ 151, 152 (1976 & Supp. IV 1980).

90. *Id.* § 301.

91. May 1981 Order, *supra* note 42, at 27,699 & n.74; *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (citing *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976)); *Telerent Leasing Corp.* 45 F.C.C.2d 204 (1974), *aff'd sub nom.* *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

92. 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976).

93. The order appealed from in this case authorized a special category of entrepreneurial mobile operators providing radio dispatch services and permitted these operators to share in the allocation of 30 MHz of frequency spectrum within the 806-921 MHz band. An Inquiry Relative to the Future Use of the Frequency Band 806-960 MHz, 51 F.C.C.2d 945, 956-57 (1975).

the FCC was not bound by the restrictive provisions of 47 U.S.C. § 152(b)<sup>94</sup> and 47 U.S.C. § 221(b).<sup>95</sup> Unlike SMR systems, CMRT systems will clearly be common carriers.<sup>96</sup> Therefore, the premise underlying the *NARUC* court's decision is not directly applicable to the CMRT situation.

Notwithstanding this, it is probable that the FCC's preemption of state entry-level regulation will be upheld if the present cellular licensing scheme is challenged. As several courts have noted, the FCC's authority with respect to regulation of radio telecommunications is very broad.<sup>97</sup> That the FCC has in the past permitted state commissions to exercise concurrent jurisdiction over entry-level issues involving inherently local services<sup>98</sup> should not be construed to prevent the FCC from asserting preemptive jurisdiction where the proposed service, although local in some respects, is clearly intended to fit within a new nationwide network of technologically advanced mobile telephone service.<sup>99</sup> As the *NARUC* court astutely observed, the cellular service envisioned by the FCC will greatly expand the capacity for mobile communications in urban areas throughout the nation.<sup>100</sup> Unlike the current mobile telephone systems, the CMRT system will be fully integrated and nationally compatible, allowing the same subscriber access to the system in any city served by CMRT.<sup>101</sup> The CMRT network envisioned by the FCC will legitimately require a greater degree of national superintendence than existing local mobile phone systems.

State challenges to the FCC's preemptive authority are likely to be based on the two state regulation savings clauses in

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94. 47 U.S.C. § 152(b) (Supp. IV 1980).

95. *Id.* § 221(b) (1976); *NARUC v. FCC*, 525 F.2d at 642-45.

96. *NARUC v. FCC*, 525 F.2d at 634 (dictum).

97. *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968); *NBC v. United States*, 319 U.S. 190, 217-19 (1943); *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

98. *See* 47 C.F.R. § 22.13(f)(1)-(2) (1981), and text accompanying notes 110-12, *infra*.

99. *See* 1980 Notice of Inquiry, *supra* note 27, at 997-99; *cf. New York Tel. Co.*, 76 F.C.C.2d 349, 354 n.8, *aff'd*, *New York Tel. Co. v. FCC*, 631 F.2d 1059 (2d Cir. 1980) (FCC preempted state jurisdiction over access charges levied against interstate users of private foreign exchange service although FCC had not previously exercised its jurisdiction to regulate the access charges).

100. 525 F.2d at 634.

101. *See* 1980 Notice of Inquiry, *supra* note 27, at 997.

the Communications Act: sections 2(b)<sup>102</sup> and 221(b).<sup>103</sup> These sections appear to prohibit the FCC from preempting state jurisdiction over CMRT. They deny the FCC jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with" intrastate wire or radio communication service (section 2(b)) and interstate wire, mobile, or point-to-point radio telephone exchange service (section 221(b)).

However, section 221(b) only preserves state jurisdiction over radio telephone exchange service that is interstate because the exchange itself straddles state lines.<sup>104</sup> Section 2(b) does not offer much more support for state commissions. It operates to exclude federal jurisdiction over intrastate facilities only when the facilities are "separable from and do not substantially affect the conduct or development of interstate communications."<sup>105</sup> As envisioned by the FCC, cellular telecommunications systems will be standardized and fully integrated into the national tele-

102. 47 U.S.C. § 152(b) (Supp. IV 1980). This section provides:

Except as provided in section 224 of this title and 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 (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 201-205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

103. *Id.* § 221(b) (1976). This section provides:

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, or any combination thereof, even though a portion of such 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.

104. See *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694 (1st Cir. 1977); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

105. *North Carolina Utils. Comm'n v. F.C.C.*, 537 F.2d 787, 793 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). See also *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977) 434 U.S. 1010 (1978); *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1046 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *Southern Pacific Communications Co. v. Corporation Comm'n*, 586 P.2d 327 (Okla. 1978).

phone network in order to permit interstate communication by local and transient subscribers.<sup>106</sup> Conflicting state regulation could clearly thwart these federal policies. In any case, the same cellular equipment will transmit both local and interstate telephone traffic; no separation of plant is contemplated or even feasible. Thus, section 2(b) will not preclude federal preemption of state entry-level regulation.

More importantly, both sections 2(b) and 221(b) are expressly subordinated to the radio licensing power granted to the FCC by section 301.<sup>107</sup> It is highly likely that the section 301 licensing power includes the inherent authority to design and administer a comprehensive scheme prescribing the conditions under which licenses will be granted.<sup>108</sup> This argument may well become the linchpin of the FCC's position with respect to entry-level regulation of CMRT systems.

A third reason why the FCC's preemption of state entry-level regulation of cellular systems should survive a direct challenge is premised on the distinction, implicit in the Communications Act and explicit in many state regulatory schemes, between

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106. See 1980 Notice of Inquiry, *supra* note 27, at 998-99.

107. 47 U.S.C. § 301 (1976) provides:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

108. See *NARUC v. FCC* 525 F.2d at 646. The court did not rely on this argument because of its determination that SMR system providers were not common carriers.



entry-level regulation and on-going rate regulation. Sections 2(b) and 221(b) are primarily concerned with rate regulation and do not squarely deal with the question of preoperational certifying procedures. It is apparent that the jurisdictional limits imposed by these sections are primarily intended to restrict federal ratemaking authority over intrastate operations. Section 301, on the other hand, deals directly with licensing procedures and must logically be construed as permitting the FCC to make the entry-level determinations inherent in an initial licensing procedure.

In summary, the compelling need for nationwide compatibility of cellular mobile telephone systems, the narrow area of exclusive state jurisdiction under sections 2(b) and 221(b), the broad grant of authority with respect to radio licensing conferred upon the FCC by section 301, and the inherent distinctions between entry-level regulation and rate regulation, lead us to conclude that the FCC's preemption order will ultimately be upheld if challenged.

This conclusion raises the related policy question of whether the FCC's exercise of its preemption prerogative is appropriate in the context of the cellular licensing process. As a general matter, the FCC is well-advised to interfere as little as possible in the state regulatory process. In other types of FCC licensing procedures local considerations often have significant importance in comparison to national interests. Such is the case, for example, with respect to entry-level regulation of AM and FM radio station operators. Applicants must obtain a certificate of convenience and necessity from the appropriate state commission before applying for a construction permit or operating license from the FCC.<sup>109</sup> Similar rules used to govern applications for existing mobile telephone service and one-way paging service.<sup>110</sup> Although relatively recent amendments to FCC regulations no longer require these applicants to obtain advance state certification,<sup>111</sup> they must, however, subsequently obtain all necessary state certificates. Failure to do so triggers automatic expiration of their FCC construction permit or operating licenses.<sup>112</sup> These procedures permit state commissions to exercise the full measure of their authority with respect to entry-level regulation.

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109. 47 C.F.R. § 22.13(f)(1) (1981).

110. See 47 C.F.R. § 22.13(f) (1976).

111. 47 C.F.R. § 22.13(f)(2) (1981).

112. *Id.*

The rationale for permitting prior or concurrent state entry-level regulation of these types of applications lies in the essentially local nature of the services they provide. Access to their services is generally available only to local subscribers. CMRT systems, in contrast, will form part of a nationwide network. They will effectively create a uniform extension of the country's telephone system. If each state were permitted to draw its own conclusions with respect to public need for CMRT and technical standards for operation of cellular systems, the nationwide CMRT network could be crippled in its infancy.

The FCC has determined that the need for CMRT service is real and immediate and that CMRT system development should proceed with all due speed.<sup>113</sup> The *NARUC* court agreed with the FCC's conclusions as to public need and upheld the FCC's orders encouraging the rapid development of CMRT technology.<sup>114</sup> Recently, the business and investment banking communities have endorsed the emerging cellular telecommunications industry, noting that the public demand for CMRT will most likely be sufficient to produce significant profits for CMRT system operators.<sup>115</sup> These conclusions are strongly buttressed by the large numbers of costly applications that have been filed for nearly every available nonwireline CMRT system license.<sup>116</sup>

We suspect that the conclusions reached independently by these diverse parties are fundamentally accurate and that the immediate need for CMRT service is very real. If such is the case, it would be appropriate as a matter of policy for the FCC to actively promote the early availability of CMRT service by seeking to eliminate or at least minimize the potential delays involved in full scale state-by-state certificating procedures.<sup>117</sup> Under the particular set of circumstances unique to this emerging industry, the FCC's assertion of preemptive jurisdiction of entry-level regulation is within its statutory authority and

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113. See March 1982 Order, *supra* note 53, at 10,031-33, which provides for "accelerated processing" of CMRT system applications.

114. 525 F.2d at 634, 638-39.

115. CMRS, *supra* note 7, at 20-28. The authors of this report are affiliated with Lehman Brothers, Kuhn, Loeb, a New York investment banking firm.

116. See *supra* notes 65, 67. An average of eight applications was filed for each nonwireline license available in the first 60 markets.

117. We anticipate that if the FCC's preemption order is upheld, those states that must by statute still go through the motions of granting a certificate of convenience and necessity will do so by using summary or otherwise expedited procedures. See *infra* text accompanying notes 166-67.

clearly in the consuming public's best interests.

### B. Antitrust Issues

In the *NARUC* case, the United States Court of Appeals for the District of Columbia Circuit expressed reservations about the regulatory framework established by the FCC in Docket No. 18,262 because of potential anticompetitive effects. The court affirmed those regulations largely because they authorized only developmental CMRTs and because of the "Commission's broad discretion in experimentation and encouragement of the broader use of radio."<sup>118</sup> Judge Wilkey, writing for the court, was careful to point out that the issue of "[w]hether and to what extent decisions of the Commission are reversible for failure to consider particular factors," i.e., competition, was much less clear.<sup>119</sup> Later in the opinion, however, he indicated that the undecided question could be considered when it was ripe for review:

We do not hold that the projected effects considered above would not constitute a breach of the antitrust component of the public convenience, interest and necessity standard, were they more immediate in time or more susceptible of precise assessment. Nor do we make any comment with regard to the particular applicability of antitrust statutes, which issue is not presently before us.<sup>120</sup>

Subsequent events have not clearly alleviated potential antitrust problems. An initial issue is whether the FCC is encouraging anticompetitive behavior by limiting the number of licenses in each SMSA to two. In Docket No. 79-318, the Commission sought comment on an unlimited entry scheme.<sup>121</sup> Some commenters urged the FCC to allow unlimited entry, but the Commission rejected this option because of the inherent limitations imposed by a system as capital intensive as CMRT.<sup>122</sup> The FCC was correct in concluding that the number of licenses

118. *NARUC V. FCC*, 525 F.2d at 647.

119. *Id.* at 636 n.25.

120. *Id.* at 639 (footnotes omitted). The court noted that "[u]nder 47 U.S.C. § 313(a) (1970), the antitrust laws are fully applicable to the manufacture, sale and trade in radio apparatus, and to interstate or foreign radio communications." *Id.* at 639 n.42.

121. 1980 Notice of Inquiry, *supra* note 27, at 992-93.

122. May 1981 Order, *supra* note 42, at 27,657-58. Most commenters supported the two systems per market approach. *Id.* at 27,657. The Justice Department encouraged the Commission to adopt a flexible entry scheme whereby a number of companies (both wireline and nonwireline) would be awarded licenses to operate on 5-10 MHz. *Id.* at 27,657-58.

in each SMSA should be restricted to avoid a proliferation of cellular facilities and to maximize spectrum efficiency. On its face, the authorization of two licenses per SMSA allows some competition, and it appears quite clear that the possible limited anticompetitive effects of such a scheme are outweighed by the interest in restricting the number of licenses, as determined by the FCC under its statutory mandate.

A second antitrust issue, created by the nationwide reservation of one of the licenses in each SMSA to a wireline company, is more difficult to resolve. Because of the Commission's stated policy that cellular systems be functioning as soon as possible and its opinion that wireline companies are best able to meet this goal, the regulatory scheme it adopted implicitly favors wireline companies over nonwireline companies. This creates a situation in which wireline companies may be given an operational headstart and the substantial competitive advantages that can accompany such a preferred market position.

Wireline applicants are favored by various portions of the cellular regulations. First, although the Commission considered placing limitations on the number of licenses any one wireline or nonwireline applicant would be granted, it chose not to do so.<sup>123</sup> Therefore, entities such as AT&T could conceivably obtain a cellular license in every SMSA in the country. This lack of limitation must also be viewed in the context of the Commission's decision not to institute the rule it had established in *Bonduel Telephone Co.*<sup>124</sup> The *Bonduel* rule would have allowed any wireline company to apply for the cellular wireline license in any SMSA.<sup>125</sup> Because the *Bonduel* rule does not apply, a wireline company is allowed to apply for wireline frequencies only in those SMSAs in which it is currently doing business itself or through a subsidiary. Naturally, this policy favors large national wireline companies such as AT&T and General Telephone and Electronics Corp. (GTE) over small local wireline exchange carriers. No similar restriction applies to nonwireline applicants; accordingly, it is almost certain that a large number of nonwireline companies will apply in every market.<sup>126</sup>

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123. 1980 Notice of Inquiry, *supra* note 27, at 994; May 1981 Order, *supra* note 42, at 27,662.

124. 68 F.C.C.2d 497 (1978).

125. *Id.* at 498-99.

126. In the first 60 markets, the average number of nonwireline applicants was four times the average number of wireline applicants. *See* sources cited *supra* notes 65, 67.

These two portions of the regulatory framework combine to greatly favor the large nationwide wireline companies, especially AT&T, and cause the so-called "headstart problem" because they guarantee a small number of wireline applicants — often only one — in each SMSA. A small number of competing applicants increases the possibility of quickly putting a cellular system into operation since it makes a settlement among the applicants more likely and makes the comparative hearing process less cumbersome. In the case in which only one qualified wireline company applies, a settlement or hearing is unnecessary.<sup>127</sup> Obviously, a system in operation holds decided marketing advantages over a system under construction. Conversely, a large number of applicants inhibits a rapid hearing or settlement process, which delays operation of a CMRT system. In a city in which demand is sufficient to make both licensed systems profitable, the favored wireline company has only a competitive advantage; in a city in which demand is lower, the wireline's headstart may well preclude successful operation of a nonwireline system by meeting local demand before the nonwireline system is even in operation. This situation creates at least a potential local monopoly problem.

Members of the Commission have recognized these problems. In a dissenting opinion to the regulatory mechanism established by the FCC orders, Commission Chairman Mark S. Fowler expressed his belief that the nationwide set-aside to wireline applicants of one-half of the frequency spectrum allocated to CMRT was unwarranted.<sup>128</sup> He feared that the "an-

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127. In 21 of the first 60 SMSAs, only one wireline applicant filed. *THE TOP 30 MARKETS*, *supra* note 7, at 124-25; *396 Applications for Markets 31-60*, *supra* note 67, at 2.

128. March 1982 Order, *supra* note 53, at 10,037-38 (Fowler, Chairman, dissenting). After the reorganization and divestiture of AT&T "all cellular licenses will be held by affiliates of the respective separated Bell Operating Companies . . ." Letter from Michael R. Greene, Vice President, General Attorney and Secretary, Advanced Mobile Phone Service, Inc., to William J. Tricarico, Secretary, Federal Communications Commission (Mar. 1, 1983). Apparently, some cellular licenses obtained by the AT&T subsidiary will be turned over to cellular subsidiaries of Bell Regional Holding Companies, as in Region Seven headquartered in Denver, while others will be turned over to Bell Operating Companies. See *Mobile Firm Picks Washington for HQ*, *Telephony*, Feb. 28, 1983, at 24, 26; *FCC Seeks Comments on Need for BOC Separate Subsidiaries*, *Telocator Network of Am. Bull.*, Mar. 4, 1983, at 1; *AT&T Divestiture Plan Sheds Little Light on RCC Issues*, *id.*, Dec. 24, 1982, at 5; *AT&T Deletes Systems Company from Cellular Plan*, *id.*, at 6; *Justice Department Says AT&T's LATA Proposal Constitutes Interchange*, *id.*, Dec. 3, 1982, at 3, 4. The comment period on the AT&T divestiture had not ended at the time this Article went to press, and thus no final action had been taken

ticompetitive difficulties” created by the set-aside and the “tenuous justification” for the Commission’s action would cause a court reviewing the regulatory framework to strike the regulations as being “arbitrary and capricious.” Even if set-aside in areas experiencing severe mobile radio congestion were warranted in order to alleviate the congestion, he argued that waiting lists for mobile telephone service in the largest cities could not support a *nationwide* set-aside.<sup>129</sup>

Chairman Fowler also disapproved of the set-aside for another reason. He believed that the only wireline company that had developed expertise in the cellular area was AT&T.<sup>130</sup> Since non-AT&T wireline companies have no greater expertise in establishing a cellular system than nonwireline applicants, he argued that reserving one license per market for wireline common carriers does not guarantee that a cellular system will be operational faster than if a nonwireline had been granted a license, at least in those markets served by non-AT&T telephone companies.<sup>131</sup> Two of his fellow commissioners shared the Chairman’s concerns but generally concurred in the regulation.<sup>132</sup>

The gravity of the anticompetitive difficulties created by the Commission’s actions is underscored by appeals filed by the Justice Department and several nonwireline companies in the United States Court of Appeals for the District of Columbia Circuit. These appeals of the Commission’s orders argued that the FCC had breached its broad discretion by reserving one-half of the spectrum allocated to CMRT to wireline companies. In a petition for review of the FCC’s Final Report and Order<sup>133</sup> and its March 1982 Order,<sup>134</sup> the Justice Department argued that the competition component of the public interest standard needed to be carefully considered in the Commission’s public interest

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by the FCC on the question. It is therefore unclear by whom AT&T cellular licenses will be held after divestiture. *FCC Seeks Comments on Need for BOC Separate Subsidiaries*, *id.*, Mar. 4, 1983, at 1.

129. *Id.*

130. *Id.* at 10,038.

131. *Id.*

132. Commissioner Anne P. Jones partially dissented, arguing that the FCC had gone too far in “establishing a set-aside in every market in the country.” *Id.* at 10,039 (Jones, Comm’r, dissenting in part). Commissioner Henry M. Rivera concurred in the decision, although he did not believe it constituted “the best public policy.” *Id.* at 10,040 (Rivera, Comm’r, concurring).

133. An Inquiry Into the Use of the Bands 825-845 MHz & 870-890 MHz for Cellular Communications Sys., Report & Order, 86 F.C.C.2d 469 (1981).

134. March 1982 Order, *supra* note 53.

determination. The FCC could not adopt a rule "which endangers competition unless that risk is necessary in order to serve some other aspect of the public interest in an effective and efficient communications system."<sup>135</sup> The brief went on to detail the Justice Department's belief that an automatic set-aside to wireline carriers was not necessary to provide cellular service in the most expeditious manner. The regulatory scheme established by the Commission was thus arbitrary and capricious and should be overturned.<sup>136</sup>

The private companies later withdrew the appeal, apparently feeling that litigation might slow down the entire licensing process.<sup>137</sup> In February 1983, the Justice Department also withdrew its appeal.<sup>138</sup> Acting Assistant Attorney General Ronald G. Carr, in a statement issued in conjunction with the Department's withdrawal of its appeal, reiterated the Department's belief that the "Commission's decision is unnecessarily anticompetitive," but stated that "under present conditions the likely success" of the appeal was small.<sup>139</sup> The Department was apparently swayed also by the feelings of nonwireline applicants who were concerned the appeal could potentially delay implementation of cellular systems.<sup>140</sup>

The Justice Department did, however, vow to deal with potential anticompetitive effects in the cellular industry in other ways, such as investigating possible violations of antitrust laws by CMRT applicants that have combined forces in several cities to seek a single license in those cities.<sup>141</sup> According to the Justice Department, AT&T and GTE, through their cellular subsidiaries, Advanced Mobile Phone Service, Inc. (AMPS) and GTE Mobilnet, have essentially agreed to split up the first thirty markets.<sup>142</sup> AT&T agreed not to pursue its applications in seven

135. Brief for Petitioner United States of America, at 13, *Millicom Inc. v. FCC*, No. 81-1404 (D.C. Cir. 1982).

136. *Id.* at 12-14.

137. *Millicom Withdraws Court Challenge of Cellular Rules*, *TELOCATOR NETWORK OF AM. BULL.*, Jan. 28, 1983, at 8.

138. Department of Justice, Press Release (Feb. 4, 1983).

139. *Id.*

140. *Justice Department Withdraws Court Challenge to F.C.C. Cellular Order*, *TELOCATOR NETWORK OF AM. BULL.* Feb. 11, 1983, at 1, 2.

141. *Id.*; *Wall Street Journal*, Feb. 7, 1983, at 5, col. 1.

142. Comments of the United States Department of Justice at 7-8 (Nov. 22, 1982), *Applications of Advanced Mobile Phone Serv., Inc., & GTE Mobilnet of Atlanta, Inc.*, Nos. 26,022-CL-P-(12)-82 (F.C.C. filed Oct. 22, 1982) [hereinafter cited as *Comments of Justice Dep't, Atlanta Applications*]. The Justice Department filed almost identical com-

SMSAs while GTE agreed not to pursue its application in twenty-two SMSAs. In eleven of the first thirty markets the two wireline giants would joint venture, with the holder of the majority ownership percentage to make all of the important decisions.<sup>143</sup> AT&T and GTE had submitted partnership proposals for three of these cities to the Commission for its authorization, but had not submitted for approval the master agreement outlining settlements in the other markets. The Justice Department felt that the antitrust problems caused by the proposed agreements in the three cities were obvious: "In the ordinary course of events, an agreement among all potential competitors to eliminate competition between them for a franchise license would raise, at the least, a serious question of possible violation of Section 1 of the Sherman Act."<sup>144</sup> Even greater potential problems were raised by the two companies' failure to submit for Commission approval the master agreement dividing interests between them in the first thirty markets. This was so because the companies could be subjected "to liability under the antitrust laws" particularly if their agreements were "made without the clear knowledge and approval of the regulatory authority."<sup>145</sup>

The anticompetitive problem created by these agreements among wireline companies is intensified by the conflicting policies promoted by the Commission. On the one hand, the FCC has noted the importance of comparative hearings in selecting

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ments on proposed settlements between AMPS and GTE Mobilnet for the San Francisco and San Jose SMSAs. Comments of the United States Department of Justice at 7-8 (Nov. 22, 1982), Applications of Advanced Mobile Phone Serv., Inc., & GTE Mobilnet of San Francisco, Inc., Nos. 26,013-CL-P-(5)-82 & 26,045-CL-P-(18)-82 (F.C.C. filed Oct. 22, 1982); Comments of the United States Department of Justice at 7-8 (Nov. 22, 1982), Applications of Advanced Mobile Phone Serv., & GTE Mobilnet of San Jose, Inc., Nos. 26-25-CL-P-(3)-82 & 26,058-CL-P-(5)-82 (F.C.C. filed Oct. 22, 1982).

143. Comments of Justice Dep't, Atlanta Applications, *supra* note 142, at 7-9.

144. *Id.* at 3. Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976). The agreement of the two wireline companies seems to fall within the area prohibited by the Sherman Act unless some regulatory immunity from enforcement under the Act can be invoked.

145. Comments of Justice Dep't, Atlanta Applications, *supra* note 142, at 9.



the best qualified applicant for a cellular license.<sup>146</sup> On the other hand, to avoid unnecessary delay, the Commission has urged wireline companies competing for licenses in those SMSAs in which there is more than one wireline applicant to "reach mutually acceptable arrangements in order to avoid electrically mutually exclusive applications which require comparative hearings."<sup>147</sup> In comments on proposed settlements by AT&T and GTE, the Justice Department seized upon the ambiguity created by the Commission's contradictory signals and questioned the validity of the proposed wireline agreements.<sup>148</sup> The Justice Department suggested that the FCC should clear up the ambiguity created by its conflicting policies in order to protect applicants, especially those wireline companies applying in numerous markets, from the antitrust laws. Either by withdrawing language encouraging competing applicants to settle and apply jointly or by explicitly stating that the public interest is to be better served by agreements among competing applicants than by comparative hearings, the FCC could remove the ambiguity.<sup>149</sup> If it chose more openly to encourage settlement among applicants and if it then clearly approved each settlement, applicants might be protected from the antitrust laws through the doctrine of implied immunity.

The Commission has responded in several ways to arguments that it is fostering anticompetitive behavior. The Commission asserts that the two competitors it now permits provide more competition than the monopoly service it originally pro-

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146. Oct. 1982 Notice (Lottery), *supra* note 73, at 45,047-48. In this proceeding, the Commission announced that it had "carefully reexamined [its] decision not to select cellular licenses through a lottery procedure, . . . and . . . again conclude[d] that a lottery would be inappropriate in the cellular service." *Id.* at 45,047. This was true because "it is especially important that the selection process be designed to award a license to an applicant proposing a high-quality cellular system." *Id.* Finally, the Commission reiterated its belief that comparative hearings were the best route for selection. "We remain of the view that the [expedited hearing] procedures are the best way to proceed with the processing of mutually exclusive applications in this new and technologically complex service." *Id.* at 45,048.

147. March 1982 Order, *supra* note 53, at 10,025. In the nonwireline context, the FCC also urged competing applicants to combine forces through joint ventures. The Commission announced, however, that in any given SMSA, companies that had negotiated settlements among themselves would not be given comparative advantage over those remaining applicants who had not entered into the settlements. American Radio-Telephone Serv., Inc., Memorandum Opinion and Order, No. 26,075-CL-P-(9)-82, at 2-3 (F.C.C. Nov. 16, 1982).

148. Comments of Justice Dep't, Atlanta Applications, *supra* note 142, at 3.

149. *Id.* at 4, 10-12.

posed. Given the facilities and capital requirements of CMRT systems, two licenses per market provide a balanced compromise between competition and efficiency. The Commission also believes that several protective measures built into the regulations promote competition and minimize potential anticompetitive effects. Resale of cellular service will potentially bring a number of competitors into the market, thus providing the advantages of market forces. Upon a sufficient showing of harm to the public interest, the Commission will delay granting an operating license to a wireline company that has completed construction of a CMRT system. Finally, the FCC has set up a two year sunset provision which allows any company, whether wireline or nonwireline, to apply for licenses for which no qualified applicant was applied during the two year period.

There are potential problems in relying on any of these protective measures, however. The development of a vigorous cellular resale market is speculative at best and thus the possible infusion of competition into CMRT by resale is questionable. Due to the Commission's commitment to put cellular systems into operation as soon as possible, the showing of harm that a nonwireline company would have to make to prompt the FCC to delay licensing of a wireline cellular system is so substantial as to be almost prohibitive. The two-year sunset provision will likely go largely unused because there will be few SMSAs that could support a CMRT in which there will not be applicants for both the wireline and nonwireline licenses. As a practical matter, then, the Commission is forced to rely on arguments other than the procompetitive measures it has built into the cellular regulations.

The Commission has repeatedly emphasized that its primary concern is with the public interest. The Commission and courts have generally agreed that competition is only one consideration which the FCC must take into account when determining what is in the public interest.<sup>150</sup> In *FCC v. RCA Communications*,<sup>151</sup> Justice Frankfurter found that "the comprehensive regulation of communications embodied in the Federal Communications Act of 1934 contradicts the notion that national policy unqualifiedly favors competition in communications." The court recognized that "encouragement of competition as such has not

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150. May 1981 Order, *supra* note 42, at 27,662.

151. 346 U.S. 86 (1953).

been considered the single or controlling reliance for safeguarding the public interest."<sup>152</sup>

Since the withdrawal of the petition for review of the regulations by the Justice Department, the regulatory system established by the FCC for CMRT is not currently being challenged in the courts. It seems likely, however, that disgruntled applicants who expend the time and money through an application and comparative hearing process will contest the validity of the regulations in the courts. As Judge Wilkey implied in the *NARUC* opinion, it is likely that such a challenge would at least be considered by the courts on review.<sup>153</sup> The Commission is confident that its view of the public interest, in conjunction with the steps it has taken to maximize competition, will overcome any court challenge.

We agree with the Commission that such challenges will ultimately be unsuccessful for several reasons. The FCC has broad regulatory discretion over radio, and courts will undoubtedly be reluctant to overturn the Commission's regulations in the absence of a clear abuse of discretion. The Commission has also been careful to make findings that the immediate operation of CMRT systems is in the public interest. Coupled with the regulatory attempts to provide at least a modicum of competition these findings make a successful challenge of the regulatory framework less likely.

There is little case law on the subject of whether an FCC order can be overturned for failure by the Commission to sufficiently consider the competition component of the public interest test, and the lack of law on this subject also seems to lessen the possibility of a successful challenge.<sup>154</sup> A court with such a

152. *Id.* at 93; *accord*, *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974).

153. *See NARUC v. FCC*, 525 F.2d at 639.

154. The courts have dealt with the related broader question of whether regulations can be invalidated "if they are not rational and based on consideration of the relevant factors." *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 803 (1978). One of the factors the Commission may take into consideration is the promotion of competition. *Id.* at 795-96. The Supreme Court once noted in dictum that:

In a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communication.

*United States v. R.C.A.*, 358 U.S. 334, 351-52 (1959). These cases address the question presented only tangentially; they do not give a direct answer as to whether a regulatory scheme can be set aside for failure to take antitrust concerns sufficiently into account.

challenge before it would also take into account the practical confusion a successful challenge could create in the CMRT industry. Finally, the court would take into account the likelihood "that the results of subsequent licensing proceedings would differ little from what they would be under the decision as it now stands."<sup>155</sup>

The thornier antitrust question is whether the Commission's orders might subject CMRT applicants to liability under the Sherman Act. Liability may turn on whether the applicants are able to claim implied immunity under the Commission's regulating scheme. The FCC did not deal directly with this issue in its orders, but seems to believe that it confers immunity from antitrust laws on applicants who join each other in consolidated applications.

The implied immunity doctrine will not be treated at length here.<sup>156</sup> In essence, when the regulatory scheme of a federal agency directly conflicts with the antitrust laws, the companies regulated by that scheme may be granted immunity from enforcement of the antitrust laws. Courts are generally reluctant to invoke the doctrine. In cases involving agencies other than the FCC, the United States Supreme Court has stated that antitrust immunities may be found only where there is "a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."<sup>157</sup> Four federal courts of appeals have refused to grant immunity in the distribution and sale of telephone terminal equipment, an area also regulated by the Commission.<sup>158</sup> However, specific factual circumstances may overcome judicial reluctance to involve the implied immunity doctrine.

Given the Commission's conflicting policy statements, arguments for implied immunity from the antitrust laws are weak. This is especially true in the case of the large-scale agreement between AT&T and GTE by which the two wireline companies

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155. Department of Justice, Press Release at 2 (Feb. 4, 1983).

156. For extensive analysis of the implied immunity issue, see Comment, *The Application of Antitrust Law to Telecommunications*, 69 CALIF. L. REV. 497 (1981); Note, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine*, 57 TEX. L. REV. 751 (1979); Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 YALE L. J. 254 (1975).

157. *United States v. National Ass'n of Sec. Dealers*, 442 U.S. 694, 719-20 (1975).

158. See *Phonetele, Inc. v. AT&T*, 664 F.2d 716 (9th Cir. 1982); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981); *Sound, Inc. v. AT&T*, 631 F.2d 1324 (8th Cir. 1980); *Essential Communications Syss., Inc. v. AT&T*, 610 F.2d 1114 (3d Cir. 1979).

essentially agreed who the wireline licensee would be in the thirty largest metropolitan areas in the country. These agreements are subject to a high degree of exposure to private antitrust actions because it would be difficult to establish that the FCC intended to hold immune from the antitrust laws large competing wireline companies that have agreed to a nationwide division of markets between them. Other, more local, agreements between competing applicants will probably be judged to be impliedly immune from the antitrust laws by the present regulatory scheme because the FCC has clearly indicated its willingness to approve such local agreements.<sup>159</sup>

At this point it is difficult to predict the ultimate resolutions of these issues. However, we agree with the Department of Justice that, in order to better protect CMRT applicants from enforcement of the antitrust laws, the FCC should be more consistent in its statements, either by relying largely on comparative hearings or by more clearly favoring the possibility of settlement among competing applicants.

#### IV. THE STATE'S ROLE IN THE REGULATION OF CMRT

The FCC's decision to preempt state determination of virtually all issues involved in the entry-level regulation of CMRT systems while leaving ongoing rate regulation of CMRT systems to the exclusive domain of the states raises some interesting practical issues that must be addressed by state public service commissions. With respect to entry-level regulation, the primary question is what remains for the states to determine. The answer to this question will greatly influence the resolution of the related issue of what type of entry-level review procedures should be instituted by state commissions for FCC-approved cellular licensees. As to rate regulation, state commissions must determine the nature and extent of their rate regulation and must ponder the potential for future FCC involvement in rate regulation if state regulation stifles CMRT development.

##### A. *Entry-Level Regulation*

In its March 1982 Order, the Commission explicitly recognized that some state commissions may desire, or may by statute

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159. See Cellular Mobile Sys. of Ind., Inc., Memorandum Opinion and Order, No. 26,172-CL-P-(11)-82, at 1-9 (F.C.C. Mar. 3, 1983).

be required, to play a complementary role in entry-level regulation of CMRT service.<sup>160</sup> However, by virtue of the Commission's preemption order, the scope of the state commission's involvement is quite limited since it may not redetermine the issues already decided by the FCC.

In general, statutes for obtaining a certificate of convenience and necessity require the applicant (1) to present evidence of compliance with county, city, municipal or other local franchise or permit requirements, and (2) to show that a public need exists, that utilities offering the same service would not be adversely affected, and that the applicant is financially capable of providing the service.<sup>161</sup>

As noted earlier the FCC has already foreclosed state consideration of public need and potential adverse affects on existing utilities by determining that there is an immediate public need for cellular service.<sup>162</sup> No state may deny certification "based on the number of existing carriers . . . or the capacity of existing carriers to handle the demand for mobile services."<sup>163</sup> Therefore, state commissions are restricted to considering the applicant's financial strength and compliance with local permit requirements.

As a practical matter, however, financial capability will already have been determined by the FCC in the process of its review of competing applications. In its order issue of May 21, 1981,<sup>164</sup> the FCC clearly indicated that, due to the large capital investment required to finance the highly sophisticated technology associated with cellular operations, cellular applicants must demonstrate that they are financially qualified to construct their proposed facility and to operate it for a reasonable period of time.<sup>165</sup> Because the FCC is placing such heavy emphasis on financial qualifications in its review process, it would be duplicative for state commissions to spend considerable time and effort to redetermine an issue that will have already been resolved by the FCC in its review of competing applicants. The FCC's preemption thus leaves only compliance with local franchising requirements for the exclusive review of state commissions.

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160. See March 1982 Order, *supra* note 53, at 10,033-34.

161. See, e.g., UTAH CODE ANN. § 54-4-25(1), (3), (6) (Supp. 1981).

162. March 1982 Order, *supra* note 53, at 10,033-34.

163. *Id.* at 10,033.

164. May 1981 Order, *supra* note 42.

165. *Id.* at 27,668.

The unique nature of the federal-state regulatory overlap with respect to the emerging cellular telecommunications industry suggests that special procedures should be implemented to speed state certificating of cellular licensees. In its March 1982 Order the FCC emphasized the clear need for expeditious handling of cellular applicants and adopted its own special accelerated procedures to accomplish this end.<sup>166</sup> Similar treatment at the state level would be appropriate, particularly in light of the FCC's preemption of most major issues and the resulting restricted scope of the state commission's review of cellular applicants.

Two important practical considerations arise regarding state entry-level review of cellular applications. The first is a question of timing; the second relates to the nature of the proceedings. The state commission's review process should probably not commence until the FCC has made its choice of licenses among competing applicants within any given service area. In nearly every service area for which the FCC has accepted applications, there are several competing nonwireline applicants. It is anticipated that the FCC's review and selection process could take between six and eighteen months to complete. Delaying the commencement of state certificating procedures until the conclusion of this selection process will ensure that the state commission does not waste valuable time and resources reviewing dozens of applications when only a very limited number of licenses will ever be approved by the FCC. The successful FCC applicant in each service area should then initiate state certificating procedures by filing an appropriate application with the state commission.

The application filed with the state commission would not need to contain more than a copy of the applicant's FCC application, together with the applicant's FCC direct case. Satisfaction of local franchising or permitting requirements could easily be verified by attachment of appropriate exhibits. Because virtually all of the important issues will have been predetermined by the FCC, the application should be reviewed using summary procedures available under most state commission rules of practice.<sup>167</sup> Those appearing before the state commission to protest should not be permitted to raise any issues that were or could have been raised before the FCC in its comparative proceedings.

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166. March 1982 Order, *supra* note 53, at 10,031.

167. *E.g.*, UTAH ADMIN. R. A67-05-1:13 (1953).

The desirability of summary procedures at the state level is underscored not only by the practical consideration that virtually all issues will have been previously resolved, but also by the FCC's requirement that a successful FCC applicant obtain all necessary state permits or licenses within a limited period of time after the issuance of the FCC construction permit.<sup>168</sup> Failure to obtain such state certification in a timely manner can result in automatic expiration of the FCC permit or license.<sup>169</sup>

Theoretically, an uncooperative state commission could delay the implementation of CMRT service within a given area by several years if it failed to endorse the applicant selected by the FCC by denying a state certificate of convenience and necessity to a successful FCC applicant. The FCC is apparently aware of this possibility and has issued a stern warning to state commissions not to be overly zealous in their entry-level CMRT regulation, indicating that if confronted with glaring noncooperation the FCC would "act expeditiously to avoid frustration of federal policy."<sup>170</sup> But mere denial of a state certificate of convenience and necessity should not trigger FCC intervention. Federal interference with nonpreempted state entry-level regulation should only be permitted when state regulation can truly be said to frustrate the policies supporting preemption, unless the FCC's decision to condition CMRT licenses upon qualification with state rules is merely a meaningless gesture.

### *B. Rate Regulation*

In contrast to its preemption of state entry-level regulation, the FCC has clearly indicated that states are free to regulate "charges, classifications, practices, services, facilities or regulations for service by [FCC] licensed carriers."<sup>171</sup> Since the FCC has chosen not to interfere, state commissions are free, subject only to their statutory mandates, to determine just how extensive their rate regulation of the emerging cellular telecommunications industry will be.

Generally speaking, state commissions have a statutory responsibility to ensure that all rates and practices of public utili-

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168. 47 C.F.R. § 22.13(f)(2) (1981).

169. *Id.*

170. May 1981 Order, *supra* note 42, at 27,669.

171. March 1982 Order, *supra* note 53, at 10,034.



ties subject to their jurisdiction are "just and reasonable."<sup>172</sup> There are, of course, several different ways to ensure that charges are just and reasonable. In a monopolistic setting, it is often necessary for the state commission and the interested utility to conduct expensive and time-consuming cost-of-service studies and rate-of-return analyses in order to protect both the consumers and the utility. This is the case with respect to telephone exchange carriers and major electric and gas utilities, which generally have a state-protected exclusive right to serve customers within their service areas.

On the other hand, when there is a measure of competition existing in the market place, state commission review of rate schedules can and should be minimized. Reduced regulatory oversight is possible because competitive forces in the market place will, by themselves, tend to produce optimal rates. For example, in Utah, as in most other jurisdictions, existing radio common carriers are subject to minimal rate regulation by the public service commission.<sup>173</sup> The rationale for this minimal level of regulation was best summarized in a decision of the Washington, D.C., Public Service Commission with respect to regulation of radio common carriers as follows:

Were it not for our statutory responsibility to pass on the reasonableness of the proposed rates, it would appear that competitive forces alone would tend to produce optimal rates for these services. Assuming that sufficient demand exists for this type of enterprise, one would expect that, in time, inefficient enterprises would disappear, while efficient ones would prosper (albeit subject to the same business risks of any non-regulated enterprise).

Consequently, we are of the opinion that rate making techniques normally employed in passing upon the reasonableness of rates proposed by utilities which are natural monopolies are inappropriate in this case.

In the case of a competitive enterprise subject to our jurisdiction we believe that it is fair to presume that rates submitted to the Commission for approval are "reasonable", in that they are, of necessity, derived from consideration of the competitive factors briefly noted above which tend to produce an optimal price. If experience proves the rate to be either too

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172. *E.g.*, UTAH CODE ANN. § 54-3-1 (Supp. 1981).

173. *See Williams v. Public Serv. Comm'n*, 29 Utah 2d 9, 12-13, 504 P.2d 34, 37 (1972).

“high” or “low” the enterprise and not the public is likely to suffer the effects.

In the instant case, the proposed rates represent a business judgment by [the carrier] regarding the prices which it must charge for its services in order to be competitive with existing carriers offering similar services. We would also presume that, in [the carrier's] judgment, these prices will ultimately produce a profit which will make the enterprise worthwhile.

Under these circumstances we find that the proposed rates are reasonable in that they are the result of competitive considerations which tend to produce optimal price levels in this industry.<sup>174</sup>

In the leading case dealing with mobile telephone service in Utah, the Utah Supreme Court extolled the benefits of competition in the existing mobile telephone market as follows:

There are certain observations which we think appropriate in regard to the problem presented in this case. The primary reason for the granting of monopoly franchises is to avoid wasteful duplication of facilities such as in railroad and [wireline] telephone services. We therefore do not lose sight of the Commission's responsibility to guard against such duplication and to so regulate such services that the public will receive the most efficient and economical service possible, which includes assuring the stability and continuity of existing services. However, in the instant situation the service to customers is over assigned wave-length air channels, and it does not appear that either the factor of duplication of expensive facilities, or the danger of impairing or destroying existing services is as important as it is with respect to some other utilities such as railroad and [wireline] telephone mentioned above. In view of those facts, there should be taken into consideration the sound principle which pervades all business activity, that competition is a wholesome and stimulating factor which tends to further the objective to be desired mentioned above: of assuring the public the best possible service in the most economical and efficient manner.<sup>175</sup>

Because the FCC has decided to build a measure of competition into the growing cellular telecommunications industry by licensing two CMRT carriers in every service area, and because cellular mobile telephone service will initially compete in several

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174. Hawkins Communications, Inc., Formal Case No. 646, Order No. 5740, at 6-7 (D.C. Pub. Serv. Comm'n 1975) (footnotes omitted).

175. Williams v. Public Serv. Comm'n, 29 Utah 2d at 12-13, 504 P.2d at 37.

ways with existing mobile telephone service, FCC cellular system licensees should initially be subject only to minimal rate regulation by state commissions. This is generally the case with current radio common carriers. Such regulation would consist essentially of a requirement that rate schedules be filed with the state commission, subject to summary approval in accordance with appropriate procedures. Presumably, cellular licensees would also be required to file with the state commission copies of any filings they must make with the FCC. Of course the prerequisite to minimal rate regulation is a state determination that competition alone will produce rates consistent with the public interest. If, for example, experience demonstrates that anticompetitive pricing of cellular service, or extreme public demand coupled with the limited number of CMRT carriers, results in excessively high rates, then state intervention in ratemaking would be justified.

It should be emphasized that although at present the extent and nature of state commissions' rate regulation of FCC cellular licensees has not been preempted, it is conceivable that the FCC would intervene in the future if state regulators attempt to stifle the CMRT industry and thereby frustrate the FCC's goal of establishing a nationwide cellular telecommunications network. The FCC justified allowing state ratemaking by referring to the reservation in sections 2(b) and 221(b) of state authority over charges, classifications, practices, and services.<sup>176</sup> Although the issue is not entirely free of doubt, and state commissions would probably challenge a federal preemption of CMRT rate regulation, the judicial construction of sections 2(b) and 221(b) does not guarantee state control over ratemaking.<sup>177</sup>

The reservations of state jurisdiction in sections 2(b) and 221(b) must give way to federal policies whenever the facilities or services regulated by the states substantially affect interstate communication or cannot be separated from interstate services and facilities.<sup>178</sup> CMRT service will be fully integrated into the telephone system. The same mobile phones and cellular transmitting and switching equipment will furnish both interstate

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176. March 1982 Order, *supra* note 53, at 10,034.

177. See *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982).

178. See *North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045-47 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 694, 699 (1st Cir. 1977).

and intrastate phone service. Therefore the CMRT network is not separable into interstate and intrastate components. Because both local and long distance service will be provided by the CMRT system many state regulatory practices could affect interstate cellular communication. Consequently, although sections 2(b) and 221(b) do appear to reserve ratemaking jurisdiction to the states, the reservation evaporates if the FCC finds that state regulatory policies substantially affect interstate cellular telecommunications.

The FCC has not yet hinted that it intends to preempt state rate regulation and the likelihood that it will do so in the near future is remote. But situations can be envisioned in which the FCC would decide to intervene. For instance, if state commissions set rates so high that public use of CMRT is substantially curtailed,<sup>179</sup> or if rates are set so low that the CMRT provider cannot provide and maintain quality service, then the FCC's "intent to stimulate the growth of mobile communication service" would be frustrated. It is doubtful whether sections 2(b) and 221(b) would provide an effective blockade against federal regulatory intervention in his situation. State regulators must be sensitive to federal policies as they exercise their jurisdiction over rates and practices of CMRT carriers. The consuming public will be well served only if the FCC and the state commissions can cooperate in establishing a reliable and nationally compatible high capacity mobile telephone network throughout the country with the least possible delay.

## V. CONCLUSION

For years the FCC has monitored and nurtured the development of cellular radio telecommunications technology. Now that the technology has been proven and a new industry is about to be born, the FCC is faced with balancing several important interests while resolving some very difficult practical and legal issues. In large measure, it appears that the FCC has done its job well. State regulatory agencies, although not likely to be pleased, should recognize that the need for nationwide technological compatibility and the immediate public need and demand for vastly improved mobile telephone service, justify FCC preemption of many important aspects of state entry-level regulation.

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179. A state commission might choose to place a surcharge on CMRT service in order to subsidize rates for basic telephone service, for example.

At the same time, these state regulators can feel confident that the FCC will not interfere with their regulation of rates and practices of cellular system operators as long as state policies do not frustrate the FCC's announced goals for cellular service. This seems to be a balance well struck and we suspect that the FCC would prevail in any court test of its preemption order.

As to the antitrust issues, the FCC's authorization of two licenses per market and its exclusive allocation of one-half of the available spectrum to wireline telephone companies should survive a direct challenge. However, there is a substantial possibility that large companies which apply for multiple licenses and combine forces in many cities will have substantial exposure under the antitrust laws. It is likely that these troubling antitrust issues will not be resolved without significant litigation that could cause unfortunate delays in the operation of CMRT systems.