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An Assessment of State and Federal Jurisdiction to Regulate Access Charges After the AT&T Divestiture

I. INTRODUCTION

Recent achievements in computer and communications technology have heralded the arrival of aggressive new competitors in several telecommunications markets. This competitive ferment coupled with the increasingly procompetitive policies of federal regulators have made the past decade a turbulent and portentous one for the nation's telecommunications industry. Nineteen eighty-three will be a pivotal year. During this year the Modification of Final Judgment (Modified Final Judgment) entered in the Justice Department's eight year old antitrust suit against the American Telephone & Telegraph Company (AT&T)[1] will begin to be implemented, culminating federal efforts to introduce competition into the provision of telephone service. The result will be the complete reorganization of AT&T, which in 1980 owned approximately ninety percent of the telephone industry's gross communications plant and garnered eighty-three percent of the total operating revenues earned by the nation's telephone companies.[2]

Prior to the divestiture, AT&T and its subsidiaries had often been criticized—and sued—for unreasonably refusing to interconnect competing long distance carriers with local telephone exchanges,[3] thus denying competitors access to the local

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1. United States v. AT&T, 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983) [hereinafter cited as Modified Final Judgment]. The United States alleged that AT&T engaged in illegal anticompetitive practices in three major markets: (1) intercity telecommunications services, (2) customer premises terminal equipment, and (3) telecommunications equipment. *See* Competitive Impact Statement in Connection With Proposed Modification of Final Judgment, 47 Fed. Reg. 7170, 7171-73 (1982) [hereinafter cited as Competitive Impact Statement]. The settlement is structured as a modification of a judgment entered in 1956 at the conclusion of an earlier antitrust action against AT&T. *Id.* at 7170-72.

2. W. Lavey, *Joint Network Planning in the Telephone Industry*, 34 FED. COM. L.J. 3, ____ (1982), *reprinted in* THE BREAKUP OF AT&T: OPPORTUNITIES, PROSPECTS, CHALLENGES 399-400 (R. Robertson & R. Wiley, Chairmen 1982).

3. A telephone exchange is a "room or building equipped so that telephone lines terminating there may be [manually or automatically] interconnected as required." NATIONAL COMMUNICATIONS SYSTEMS, OFFICE OF TECHNOLOGY AND STANDARDS; FEDERAL

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switching network. This access is critical to the competing carriers since they own facilities for transporting telephone traffic between cities, but have no means of distributing the originating and terminating call within the cities of origin and destination. To cure these anticompetitive practices, the Modified Final Judgment separates those subsidiaries of AT&T currently providing local exchange telephone service, which is generally regulated as a natural monopoly, from those subsidiaries furnishing unregulated nonmonopoly services, such as long distance (interexchange) service. This separation of functions is intended to remove any incentive for AT&T's subsidiaries to discriminate against AT&T's competitors in the provision of nonmonopoly services.[4]

Very briefly, the terms of the Modified Final Judgment require AT&T to divest itself of portions of its subsidiaries currently providing local telephone service (Bell Operating Companies or BOCs).[5] After completion of the divestiture, BOCs will provide exchange service[6] and nondiscriminatory exchange ac-

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STANDARD—1037, GLOSSARY OF TELECOMMUNICATIONS TERMS 45 (1980). Most communities are linked together by several exchanges forming an integrated network. Telephone exchange service can generally be defined as "service within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 U.S.C. § 153(r) (1976).

4. Competitive Impact Statement, *supra* note 1, at 7173. Interestingly, the Modified Final Judgment does not prevent AT&T from reentering the local exchange market after completing the required divestiture. There has been some concern among state commissions that AT&T might compete with exchange carriers by bypassing the local exchange to service its large interexchange customers and by supplying local wiring between its large interexchange customers.

5. The entire Modified Final Judgment is explicated in Response to Public Comments on Proposed Modification of Final Judgment, 47 Fed. Reg. 23,320 (1982) [hereinafter cited as Response to Public Comments] and Competitive Impact Statement, *supra* note 1.

6. Modified Final Judgment, *supra* note 1, at 227. *Exchange service* is not defined in the Modified Final Judgment or appendix, but presumably includes all functions normally provided by an exchange which are natural monopolies regulated by tariff. *See* Modified Final Judgment, *supra* note 1, at 228-30; *supra* note 3. The use of the term *exchange area* in the Modified Final Judgment does not necessarily correspond to the term as traditionally used in the Communications Act of 1934 and in ratemaking proceedings. Thus, the parties involved in the divestiture have adopted the term "Local Access and Transport Area" (LATA) to identify the exchange area prescribed by the Modified Final Judgment. *See* Modified Final Judgment, *supra* note 1, at 229; Application of the American Telephone and Telegraph Company and the Bell System Operating Companies for Approval of Exchange Areas of Local Access and Transport Areas (LATAs) Established Pursuant to the Modification of Final Judgment at 2-4, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). LATAs are employed only to divide the provision of ser-

HeinOnline -- 1983 BYU L. Rev. 377 1983

cess[7] to all interexchange carriers. BOCs may not provide interexchange telecommunications services,[8] manufacture telecommunications equipment, or provide any other service that is not a natural monopoly regulated by a tariff.[9] AT&T remains free to compete with other providers of interexchange service and may manufacture and market telecommunications equipment and services.[10]

The sweeping terms of the Modified Final Judgment[11] will have a dramatic impact on the methods used by telephone companies to recover the costs of providing exchange service to telephone subscribers. Whether they travel across the block or across the continent, virtually all telephone calls must originate and terminate on the equipment provided by the local exchange. It follows that for ratemaking purposes the cost of providing local exchange service should be borne by both local and long distance callers. In *Smith v. Illinois Bell Telephone Co.*, the United States Supreme Court required exchange plant costs to

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vices among AT&T and the BOCs under the modified Final Judgment. They do not determine local or long distance rates and are not binding on non-AT&T carriers. *See* Motion to Affirm (by the Department of Justice) at 23 n.29, Maryland v. United States, 103 S. Ct. 1240 (1983).

7. "Exchange access" means the provision of exchange services telecommunications. Exchange access services include any acitivity or function performed by a BOC in connection with the origination or termination of interexchange telecommunications, including but not limited to, the provision of network control signalling, answer supervision, automatic calling number identification, carrier access codes, directory services, testing and maintenance of facilities and the provision of information necessary to bill customers. Such services shall be provided by facilities in an exchange area for the transmission, switching, or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC.

Modified Final Judgment, *supra* note 1, at 228-29.

8. " 'Interexchange telecommunications' means telecommunications between a point or points located in one exchange telecommunications area and a point located in one or more other exchange areas or a point outside an exchange area." *Id.* at 29.

9. *Id.* at 227-28. Additionally, as part of the divestiture BOCs are required to sell or transfer to AT&T their imbedded base in customer premises equipment. After 1983 BOCs will be permitted to reenter the customer premises equipment market. *See id.* at 231.

10. *See id.* at 226-28.

11. One large subscriber to telephone services has suggested that the "settlement is less a means to address the alleged wrongdoing than a complete reformulation of national telecommunications policy in terms favorable to AT&T." Comments of the City of New York Concerning Proposed Modifications of Consent Decree at 11, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

HeinOnline -- 1983 BYU L. Rev. 378 1983

be partially defrayed by interstate users.[12] Since this early decision, the Federal Communications Commission (FCC or Commission), state regulators, and telephone companies have developed an intricate, two-step procedure called separation and settlements. The separations process involves allocating exchange costs between interstate and intrastate users.[13] Interstate costs are recovered under the FCC's ratemaking authority; intrastate costs are incorporated into rates set by state regulators. Under the settlements procedures, exchange carriers receive the net revenues due for the use of their exchange by long distance carriers.[14]

The Modified Final Judgment eliminates the division of revenues mechanism currently used to allocate monies to an exchange carrier for exchange services. The judgment adopts in its place a system of access charges, implemented through tariffs filed by BOCs and applied to all interexchange carriers which seek interconnection with the local exchange.[15] The tariffs may not discriminate against any carrier and must be "cost justified."[16] In addition, the tariffs must offer exchange services on an unbundled basis, must specify the individual elements of each type of service, and must charge only for types of access actually used by the exchange carrier.[17]

The creation of a system of access charges may have significant consequences for the revenue requirements of telephone companies. It involves billions of dollars and will affect every American that uses a telephone.[18] Revenues derived from separations and settlements have traditionally been used to offset increasing costs of local exchange service, allowing state regulators to encourage greater subscription to basic telephone service.[19] A

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12. 282 U.S. 133 (1930).

13. S. REP. No. 170, 97th Cong., 2d Sess. 18 (1982). The procedures have been standardized in the "Separations Manual" and assimilated into the Commission's rules. *See* Jurisdictional Separation of Tel. Cos., 16 F.C.C.2d 317, 331-32 (1969); 47 C.F.R. § 67.1 (1979). On the development of the separations procedures, see generally New York Tel. Co. v. FCC, 631 F.2d 1059, 1062-63 (2d Cir. 1980).

14. S. REP. No. 170, 97th Cong., 2d Sess. 18 (1982).

15. Modified Final Judgment, *supra* note 1, app. B at 232-34.

16. *Id.* at 233.

17. *Id.*

18. Federal Communications Commission, Press Release, *FCC Adopts Access Charge Rules for Compensating Local Carriers for Origination and Termination of Interstate and International Calls*, Report No. 17311 (December 23, 1982) (statements of Chairman Fowler and Commissioner Quello) [herinafter cited as Press Release].

19. Opponents often attack this cost allocation policy as an undesirable and unnec-

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state or federal regulator with control over access charges has a powerful tool which may be used to distribute the burden of telephone service among various classes of subscribers and otherwise accomplish the statutory objectives assigned to the regulator.[20] For example, by shifting the allocation of certain access costs attributable to private lines, the New York Public Service Commission recently attempted to order intrastate rate decreases totalling nearly forty million dollars.[21]

The Modified Final Judgment does not specify which state or federal agencies will have authority to regulate the terms and conditions of access charges. However, the allocation of jurisdiction over access charges between state and federal regulators is enormously important after the divestiture. To the extent state regulators lack control over access charges, they will lose this source of rate stabilizing income. This potential loss is more critical, given the recent striking changes in the policy of telecommunications rate regulation.[22] Ratemaking based on value of service, which permitted cross subsidization of important services,

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essary subsidy. They claim that current jurisdictional separations procedures create economic inefficiencies by setting the price for exchange access at levels higher than the actual costs of providing the exchange access. State regulators reply that local exchanges must be specially designed to accommodate toll users, justifying a higher charge to a toll user than that levied against a local customer. *E.g.*, 1 *Telecommunications Act of 1982: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 213-14 (1982) (statement of Edward B. Hipp, Commissioner, North Carolina Utils. Comm'n) [hereinafter cited as *Hearings*]. States also argue that access charges are not economically inappropriate when priced at levels less than the cost of bypassing the exchange. *See id.* at 321 (remarks of Henry Rollins, Commissioner, Public Util. Comm'n of Texas). The actual level and structure at which access charges should be set are beyond the scope of this paper.

Another service which has often been provided by exchange carriers at noncompetitive prices in order to support low basic rates is the provision of customer premises equipment. Comments of the New York State Department of Public Service at 11, Fourth Supplemental Notice of Inquiry and Proposed Rulemaking, MTS and WATS Mkt. Structure, 47 Fed. Reg. 26,688 (1982) [the FCC proceeding is hereinafter citeed as Fourth Supplemental Notice]. *See also* Comments of the Public Service Board, State of Vermont at 10, *id.* (numerous "cross-subsidies" exist in the interstate message toll rate structure).

20. North Carolina Utils. Comm'n v. FCC, 537 F.2d 787, 799 (4th Cir.) (Widener, J., dissenting), *cert. denied*, 429 U.S. 1027 (1976).

21. New York Tel. Co. v. FCC, 631 F.2d 1059, 1063 (2d Cir. 1980).

22. *See, e.g.*, Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982); North Carolina Utils. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976). *See generally* Competitive Impact Statement, *supra* note 1, at 7171-72.

HeinOnline -- 1983 BYU L. Rev. 380 1983

is giving way to ratemaking based on cost of service.[23] The rate base available to generate revenues and access charges will probably shrink as assets are transferred to AT&T from the BOCs during the divestiture.[24] These factors will inevitably combine with inflation to force the cost of local exchange service upward. If the cost of exchange service increases too much, high volume subscribers might find it economical to bypass the local exchange and low income subscribers might choose to discontinue phone service altogether.

Authority to control the rate structure of the public utilities has long been recognized as a key feature of a regulator's autonomy.[25] As the cost of service increases, jurisdiction over access charges may become a political bone of contention between state and federal regulators. Sensitive to consumer complaints about rising prices, state commissions are especially reluctant to be placed in a position in which they must pass through rate increases for exchange service that appear to be local but are caused by the FCC.[26]

Additionally, the balance between access charges and local exchange rates is one of the critical factors of commercial success in the competitive interexchange market.[27] The "key ingredient" in that balance is the nature of the administrative body which will set access rates.[28] Thus, the jurisdiction of state and federal regulators over access charges is a matter in which interexchange carriers will be vitally interested after the divestiture.

This Comment explores federal and state jurisdiction over the level, nature, and implementation of access charges after the AT&T divestiture.[29] The extent of state and federal control over

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23. Letter from Edward C. Addison, Director, State Corp. Comm'n, Div. of Communications, Commonwealth of Virginia, at 1 (December 6, 1982) [hereinafter cited as Addison Letter].

24. 1 *Hearings*, *supra* note 19, at 233 (statement of Eric J. Schneidewind, Chairman, Michigan Pub. Serv. Comm'n).

25. "The separation of the intrastate and interstate property, revenues and expenses of the Company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation." Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 148 (1930).

26. *See* Comments of the Florida Public Service Commission at 12, Fourth Supplemental Notice, *supra* note 19.

27. 3 *Hearings*, *supra* note 19, at 581-82 (statement of Anthony G. Oettinger, Chairman, Program on Information Resources Policy, Harvard Univ.).

28. 1 *id.* at 128 (statement of Edward F. Burke, President, National Ass'n of Regulatory Util. Comm'rs (NARUC)).

29. Issues relating to the proper content and rate structure of access charges are not

HeinOnline -- 1983 BYU L. Rev. 381 1983

access charges is considered from two extremes: whether the states can exercise exclusive control over the fees as a function of their power over exchange rates and other services local in nature, or whether the Commission may preempt all state regulation in the area. An analysis of Commission decisions and case law interpreting the Communications Act of 1934 suggests that federal jurisdiction over access charges is substantial. However, these authorities should probably not be construed to allow preemption of state control over intrastate access fees. Controversy over access charges and the recent spate of litigation over jurisdictional divisions suggest that the Communications Act of 1934 should be revised to address more clearly the regulation of access charges and other issues confronting modern telecommunications regulators.

II. Jurisdiction to Regulate Access Charges

A. *Impact of the Modified Final Judgment*

While the Modified Final Judgment replaces the contractual settlements process with a system of access charge tariffs, the judgment actually has little effect on the substantive guidelines and jurisdictional allocations currently embodied in separations procedures.[30] The judgment's requirement of cost-justified access tariffs does not mean that regulators will be unable to allocate costs to assess a surcharge for the benefit of local exchanges. It merely precludes the BOCs from discriminating in filing tariffs.[31]

The FCC has suggested that the courts may lack authority to compel the FCC to replace its system of separations and settlements with access charges, since the FCC has been entrusted with primary jurisdiction "to prescribe and approve rates, prac-

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treated in this Comment.

30. Competitive Impact Statement, *supra* note 1, at 7170.

31. United States v. AT&T, 552 F. Supp. 131, 169 n.161 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983); Response to Public Comments, *supra* note 5, at 23,331; 1 *Hearings*, *supra* note 19, at 650 (statement of Gary Epstein, Chief, Common Carrier Bureau, FCC). These reassurances should silence the fears of some observers that the use of jurisdictional separations to allocate costs to the interstate revenue requirement would be jeopardized by the Modified Final Judgment. *See* Comments of the City of New York Concerning Proposed Modification of Consent Decree at 9, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983); 1 *Hearings*, *supra* note 19, at 649 (remarks of Joseph R. Fogarty, Commissioner, FCC).

HeinOnline -- 1983 BYU L. Rev. 382 1983

tices, procedures and regulations set forth in tariffs."[32] Similar arguments were brushed aside in the district court's opinion approving the settlement, and did not dissuade the Supreme Court from summarily affirming the district court.[33] In any case, given the FCC's general agreement with the terms and effects of the Modified Final Judgment[34] and its current intent to implement an access charge system,[35] the issue is probably moot.

The allocation of jurisdiction between the FCC and state commissions is probably also unaffected by the judgment.[36] Some observers have expressed concern over the Modified Final Judgment's apparent implicit assumption that postdivestiture state jurisdiction will be limited to the exchange area, while federal jurisdiction will be expanded into intrastate interexchange services and facilities.[37] The language giving rise to this assumption was apparently inserted to track legislation then pending, which has not been enacted.[38] The parties to the antitrust action and most observers have made a point of assuring the courts and Congress that the Modified Final Judgment is neutral on the question of who will regulate access charges. The issue will be determined independently of the Modified Final Judgment.[39]

Recognizing that the Modified Final Judgment alone has

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32. 1 *Hearings*, *supra* note 19, at 643 (memorandum by Joseph R. Fogarty, Commissioner, FCC) (quoting Memorandum of the FCC as amicus curiae in United States v. AT&T, 62 F.C.C.2d 1102, 1115-16 (1977)).

33. *See* United States v. AT&T, 552 F. Supp. 131, 211 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

34. *See id.*; 1 *Hearings*, *supra* note 19, at 629-31 (remarks of Mark Fowler, Chairman, FCC).

35. The Commission is currently conducting a proceeding to design a nationwide interstate access charge system. *See* Fourth Supplemental Notice, *supra* note 19. A tentative decision was reached by the Commission on December 22, 1982. *See* Press Release, *supra* note 18. As this Comment goes to press, no formal decision has yet been issued.

36. Response to Public Comments, *supra* note 5, at 23,331-32.

37. 1 *Hearings*, *supra* note 19, at 644 (memorandum by Joseph R. Fogarty, Commissioner, FCC); *id.* at 789 (remarks of Theodore F. Brophy, Chairman and Chief Executive Officer, General Tel. & Elec. Corp.).

38. The Telecommunications Act of 1982, H.R. 5158, 97th Cong., 2d Sess. (1982), and The Telecommunications, Competition and Deregulation Act of 1981, S. 989, 97th Cong., 1st Sess. (1981), would have extended federal jurisdiction into intrastate interexchange telecommunications. *See also supra* note 37.

39. *Proposed Antitrust Settlement of U.S. v. AT&T: Joint Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the Comm. on Energy and Commerce and the Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong., 2d Sess. 27 (1982) (statement of Charles L. Brown, Chairman, AT&T) [hereinafter cited as *Joint Hearings*]; *id.* at 57 (statement of Howard J. Trienens, Vice President and General Counsel, AT&T); Motion to Affirm (by the Department of Justice) at 23-24, Maryland v. United States, 103 S. Ct. 1240 (1983).

HeinOnline -- 1983 BYU L. Rev. 383 1983

not created such an extensive jurisdictional overhaul, state and federal regulators are currently proceeding under the assumption that state commissions will fix access rates for intrastate interexchange service, and the FCC will determine access fees for interstate exchange service.[40] BOCs will file tariffs with the state commissions for intrastate access charges and with the FCC for interstate access fees.[41]

The jurisdictional allocation of access charges being fashioned under the Modified Final Judgment has not yet been tested for consistency with the Communications Act of 1934. Most state and federal regulators appear comfortable with the division of jurisdiction over access regulation as it now stands.[42] However, there are several statutory provisions and jurisdictional doctrines which could be used to challenge this manner of implementing access charges. Depending upon how they are interpreted, these doctrines could significantly shift the regulatory balance in favor of either the state commissions or the FCC.

B. An Overview of State and Federal Jurisdiction Under the Communications Act of 1934

A knowledge of events which shaped the Communications Act of 1934 (Act) guides the understanding and proper construction of its provisions. Immediately before the Act's passage, no single federal regulatory body exercised unified control over the communications field.[43] The Interstate Commerce Commission (ICC) was the primary regulator of the telephone network, while

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40. *See, e.g.*, Addison Letter, *supra* note 23, at 2. *See also* United States v. AT&T, 552 F. Supp. 131, 169 n.161 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

41. United States v. AT&T, 552 F. Supp. 131, 196 n.271 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983); Press Release, *supra* note 18, at 1. Apparently the Commission has chosen to help administer the access charge system through a new "exchange carrier association." *Id.* at 3. It had considered a delegation to the states of authority to administer and enforce state-by-state access charges, subject to overriding federal control in case of discrimination. *See* Fourth Supplemental Notice, *supra* note 19, at 26,673. This latter option would have reserved to the states an extensive practical control over access charge administration.

42. *See, e.g.*, Letter from Lawrence G. Malone, Assistant Counsel, Department of Pub. Serv., State of New York, at 1 (December 9, 1982) [hereinafter cited as Malone Letter]; Letter from Neil A. Swift, Director, Communications Div., Department of Pub. Serv., State of New York, at 1 (November 30, 1982) [hereinafter cited as Swift Letter]; Addison Letter, *supra* note 23, at 2.

43. *See generally* Note, *Separating the Jurisdictional Authorities of State and Federal Administrators in the Regulation of the Physical Equipment Within the Nation's Telephone Network*, 8 TOLEDO L. REV. 733, 744-45 (1977).

HeinOnline -- 1983 BYU L. Rev. 384 1983

the Federal Radio Commission governed radio broadcasting. For a variety of reasons neither agency was entirely successful in exercising vigorous and efficacious leadership over communications.[44] Consequently, President Franklin D. Roosevelt recommended to Congress that all federal communications regulation be centralized under the aegis of one new agency, the Federal Communications Commission. President Roosevelt also recommended that the new commission be vested with the full authority then possessed by the ICC, and Congress began to draft enabling legislation.[45]

State commissions reacted immediately. In *Houston, East & West Texas Railway v. United States (Shreveport)*[46] the United States Supreme Court had upheld the ICC's authority to set intrastate railroad rates when necessary to correct intrastate discrimination against interstate shippers. The result was an immediate curtailment of state railroad commissions' power to fix independently intrastate railroad rates.[47] The *Shreveport* power was never fully exercised in the telephone field, but state public service commissions were not anxious to see this sword of Damocles handed to the new FCC, and they petitioned Congress for relief.[48] Congress was sympathetic. After consulting state commission representatives in a series of hearings and conferences, the drafters included several provisions designed "to reserve to the State commissions the control of intrastate telephone traffic."[49] As originally introduced, the Senate[50] and House[51] bills contained, in addition to a standard conferral of jurisdiction over interstate traffic,[52] clauses *excluding* jurisdiction over intrastate traffic,[53] interstate exchange service,[54] and certain other

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44. *Id.* at 741, 744-45.

45. *See* H.R. REP. No. 1850, 73d Cong., 2d Sess. 1-2 (1934).

46. 234 U.S. 342 (1914).

47. *See* Note, *supra* note 43, at 740-42.

48. *See, e.g., Federal Communications Commission: Hearings on S. 2910 Before the Comm. on Interstate Commerce*, 73d Cong., 2d Sess. 180 (1934) (statement of John E. Benton, General Solicitor, NARUC: "Unless the Congress wants to destroy State regulation over telephone companies, it cannot merely transfer the existing power of the [I.C.C.]") [hereinafter cited as 1934 *Senate Hearings*]. At least one party urged Congress to confer more authority in areas where the I.C.C. had been reluctant to exercise its jurisdiction. *Id.* at 109-12 (letters of James B. McDonough).

49. 78 CONG. REC. 8823 (1934) (statement of Sen. Dill).

50. S. 2910, 73rd Cong., 2d Sess. (1934).

51. H.R. 8301, 73d Cong., 2d Sess. (1934).

52. S. 2910, 73d Cong., 2d Sess. § 2 (1934).

53. *Id.* § 210.

54. *Id.* § 221(b). *See also id.* § 214(e).

HeinOnline -- 1983 BYU L. Rev. 385 1983

areas.[55]

As it emerged from Congress the Act preserved these jurisdictional limits.[56] It created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire . . . so as to make available, so far as possible, . . . a rapid, efficient, Nationwide . . . wire . . . communication service with adequate facilities at reasonable charges."[57] To enable the Commission to accomplish these goals, in section 2(a) Congress conferred upon it jurisdiction over "all interstate and foreign communication by wire."[58] The scope of that authority was circumscribed by section 2(b)(1):

> [S]ubject to the provisions of section 301 of this title [governing broadcasters], nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire . . . of any carrier . . . .[59]

Section 221(b) also excluded the FCC from the regulation of certain kinds of exchange services:

> 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 . . . telephone exchange service . . . 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.[60]

Finally, a floor amendment in the House resulted in a further

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55. Section 214(e) excluded the Commission from jurisdiction to require a certificate of convenience and necessity for "the construction, operation, or extension of lines or circuits within a single state." 1934 *Senate Hearings*, *supra* note 48, at 9. After criticism of the overinclusiveness of section 214, see *id.* at 88-91 (statement of Walter S. Gifford, President, AT&T), this jurisdictional limit was apparently redefined in 47 U.S.C. § 214(a) (1976). Section 220(j) limited the Commission's authority to preempt state power to impose state accounting procedures and prescribe certain depreciation rates. 1934 *Senate Hearings*, *supra* note 48, at 12. Section 220(j) was later deleted.

56. *See* H.R. CONF. REP. No. 1918, 73d Cong., 2d Sess. 1-2, 18 (1934).

57. 47 U.S.C. § 151 (1976).

58. *Id.* § 152(a).

59. 47 U.S.C. § 152(b)(1) (Supp. IV 1980). *See also* S. REP. No. 781, 73d Cong., 2d Sess. 3 (1934) (Section 2 reserves to the states "exclusive jurisdiction over intrastate" communications).

60. 47 U.S.C. § 221(b) (1976).

HeinOnline -- 1983 BYU L. Rev. 386 1983

manifestation of congressional intent to reserve intrastate telephone regulation to the states. Section 2(b)(2) declares that,

> 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 . . . 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 . . . .[61]

Although Congress could have constitutionally asserted federal jurisdiction over most aspects of intrastate telecommunications,[62] it chose to allow the continued existence of joint state and federal jurisdiction. Allocation of authority within the jurisdictional partnership was delineated by an apparently bright line clearly granting the FCC control over interstate traffic, while reserving intrastate traffic to the states.[63]

C. Exclusive State Jurisdiction over Access Charges

1. Section 221(b): multistate telephone exchange service

Any party asserting exclusive control over access regulation may seek refuge in the shimmering oasis offered by section 221(b) of the Act. The terms of the section are enticingly unqualified: "*nothing* in this chapter shall be construed . . . to give the Commission jurisdiction [over] telephone exchange service . . . *even though a portion of such exchange service constitutes interstate or foreign communication* . . . ."[64] Access fees are by definition charges to interexchange carriers for telephone exchange service. The literal language of section 221(b) would exclude federal jurisdiction to regulate any aspect of exchange access charges, including those for interstate calls.

At least one lobbyist testifying before the Senate on the effect of the proposed Act interpreted the Act in exactly this fash-

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61. *Id.* § 152(b) (Supp. IV 1980).

62. State commissions arguing against a proposed bill that would have extended federal jurisdiction over intrastate interexchange communications did not assert that the bill was outside Congress' constitutional authority. *See generally* 1 *Hearings*, *supra* note 19, at 152-343. The restricted jurisdiction of the FCC over telecommunications should be compared to its much broader authority over broadcasting in Title III of the Act. *See, e.g.*, Ward v. Northern Ohio Tel. Co., 300 F.2d 816, 820 (6th Cir. 1962); Arthur Brothers, 65 F.C.C.2d 608, 610 (1977).

63. *See* Diamond Int'l Corp. v. F.C.C., 627 F.2d 489, 492 (D.C. Cir. 1980).

64. 47 U.S.C. § 221(b) (1976) (emphasis added).

HeinOnline -- 1983 BYU L. Rev. 387 1983

ion.[65] One recent federal case appeared to adopt this rationale.[66] The argument is plausible: exchange facilities are almost invariably located entirely within one state, and their services are overwhelmingly local in nature. The Act's drafters stressed that, while modeling the Act on the Interstate Commerce Act, they were *adding* several provisions designed to protect state jurisdiction.[67] As introduced, the Act's two major provisions limiting jurisdiction were sections 221(b) and 2(b)(1).[68] Since the Interstate Commerce Act contained a restriction similar to 2(b)(1) at the time of the *Shreveport* decision,[69] it is logical to assume that the drafters were not relying on section 2(b)(1) to preserve state jurisdiction. The conclusion can be drawn that section 221(b) was therefore intended as the primary protector of state jurisdiction. Similar reasoning has even supported an argument that Congress intended to divide state and federal jurisdiction physically between exchange plant and interexchange plant.[70]

As it turns out, the apparent oasis is only a mirage. An array of Commission, state, and federal decisions rejects the literal language of section 221(b) in favor of a more limited interpretation derived from the legislative history. As reported to the House, this section "conform[s] to recommendations of the State commissions, and will enable those commissions . . . to regulate exchange services *in metropolitan areas overlapping state lines*."[71] This explanation of section 221(b) has generally seemed more reasonable to the courts in view of the extreme results reached through strict adherence to the statutory text. Explicating the jurisdictional scheme of the Act, Chief Justice Warren

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65. *See* 1934 *Senate Hearings*, *supra* note 48, at 199 (statement of Edward N. Nockels, Legislative Representative, American Fed'n of Labor).

66. Kitchen v. FCC, 464 F.2d 801, 803 (D.C. Cir. 1972).

67. 1934 *Senate Hearings*, *supra* note 48, at 179. "[A]t the request of the State commission representatives, we wrote in certain provisions *that are not in the Interstate Commerce Act*, to protect the State commissions against being overriden by [the FCC], as the Interstate Commerce Commission has overridden some of the railroad State commisssions." *Id.* (statement of Sen. Dill) (emphasis added).

68. Section 2(b)(2) was added as a floor amendment. 78 CONG. REC. 8846-47 (remarks of Senators Clark and Dill). Other proposed jurisdictional limits were later deleted, or are not relevant here. *See supra* note 55.

69. *See Shreveport*, 234 U.S. at 356-57. *See also* 36 Stat. 545 (1910): "*Provided, however*, that the provisions of this Act shall not apply to . . . the transportation of messages by telephone, telegraph or cable wholly within one State and not transmitted to or from a foreign country . . . ." (repealed by Pub. L. No. 95-473, § 4(b), Oct. 17, 1978, 92 Stat. 1466, 1470; current version at 49 U.S.C. § 10,501(b)(1) (Supp. IV 1980)).

70. *See* Note, *supra* note 43, at 747.

71. H.R. REP. No. 1850, 73d Cong., 2d Sess. 7 (1934) (emphasis added).

HeinOnline -- 1983 BYU L. Rev. 388 1983

described the effect of section 221(b) by quoting from the legislative history instead of the statutory language.[72] Although not controlling, this departure is telling since the terms of the section were not directly in issue, and one might typically have expected a brief reference to the statutory language to suffice.

Those courts which have been confronted by state attempts to exorcize federal jurisdiction under section 221(b) have uniformly limited the section to the legislative history. In *North Carolina Utilities Commission v. FCC (NCUC I)*,[73] the United States Court of Appeals for the Fourth Circuit upheld an FCC order[74] outlining the extent to which the FCC was preempting state regulation of the terms and conditions governing the attachment of customer-provided telephone equipment. Briefly citing the legislative history of section 221(b), the court found that section 221(b) precludes federal jurisdiction only over exchanges that span state lines. Exchanges located entirely intrastate are, it held, not given more freedom from federal jurisdiction than that provided in section 2(b)(1).[75]

NCUC I was immediately reiterated by another Fourth Circuit decision, *North Carolina Utilities Commission v. FCC (NCUC II)*,[76] which affirmed the Commission's jurisdiction to prescribe the specific conditions governing the interconnection of customer-provided terminal equipment. Relying on the reasoning of *NCUC I*, the court again concluded that "the purpose of section 221(b) is to enable state commissions to regulate local exchange service in metropolitan areas, such as New York, Washington or Kansas City, which extend across state boundaries."[77] The First Circuit reached the same result in *Puerto Rico Telephone Co. v. FCC*:[78]

> [W]e are convinced that § 221(b) was intended not as a general grant of autonomy to state commissions, but as a special grant of freedom . . . for those few, essentially local, telephone exchange services which serve metropolitan areas embracing parts of several states. As such, § 221(b) was probably intended simply to provide the same degree of autonomy for state regu-

72. Benanti v. United States, 355 U.S. 96, 105 n.16 (1957).
73. 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).
74. Telerent Leasing Corp., 45 F.C.C.2d 204 (1974).
75. 537 F.2d at 795.
76. 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).
77. *Id.* at 1045 (emphasis added).
78. 553 F.2d 694 (1st Cir. 1977).

HeinOnline -- 1983 BYU L. Rev. 389 1983

> lation of multistate metropolitan area exchanges as § 2(b) provides for wholly intrastate metropolitan exchanges.[79]

These cases persuaded the District of Columbia Circuit to disapprove of its language in an earlier case which construed the statutory language more broadly than its history can support.[80]

Even a state decision has construed section 221(b) as narrowly as the federal appellate courts have. In *Sherdon v. Dann* the Nebraska Supreme Court presaged the *NCUC I* ruling, upholding the FCC's preemption of inconsistent state regulation controlling terminal equipment attachment.[81] In fact, the only two cases in which state regulators have successfully stopped an assertion of federal authority under 221(b) are limited to situations involving a multistate exchange;[82] these have not supported an extension of 221(b) into intrastate exchange regulation.

These appellate decisions are supported by a fairly consistent line of FCC decisions which indicate that the Commission has never interpreted section 221(b) as a serious restriction on its jurisdiction over exchange services.[83] Bolstered by these court decisions, recent articulations by the Commission indicate that it will recognize a section 221(b) limit on its jurisdiction only when (a) the exchange straddles state lines and (b) the kind of service offered within the exchange is a type with which Congress was concerned when it enacted section 221(b).[84]

The present weight of authority makes it clear that section 221(b) does not confer upon state commissions exclusive authority to regulate all access charges.

2. *Section 2(b)(1): intrastate communications*

Given the narrow scope of section 221(b), section 2(b)(1) is

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79. *Id.* at 698-99.

80. Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 216-17 (D.C. Cir. 1982).

81. 193 Neb. 768, 299 N.W.2d 531 (1975). The *Sherdon* majority reached its decision over the dissent's reliance on § 221(b). *Id.* at 779-80, 229 N.W.2d at 538 (Newton, J., dissenting).

82. General Tel. Co. of the Southwest v. Robinson, 132 F. Supp. 39 (E.D. Ark. 1955); Southwestern Bell Tel. Co. v. United States, 45 F. Supp. 403 (W.D. Mo. 1942).

83. *See* Southern Pac. Communications Co., 61 F.C.C.2d 144, 145-46 (1976), *reconsideration denied*, 63 F.C.C.2d 309 (1977); Telerent Leasing Corp., 45 F.C.C.2d 204, 214-21 (1974); *see also infra* notes 111-20.

84. Department of Defense v. Chesapeake v. Potomac Tel. Co., 71 F.C.C.2d 1336 (1979).

HeinOnline -- 1983 BYU L. Rev. 390 1983

the primary guarantor of state autonomy over wholly intrastate and multistate metropolitan exchanges.[85] Since section 2(b)(1) affirmatively excludes federal control over "charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate communication service*,"[86] it becomes crucial to define intrastate communications.

Much of the confusion over the proper allocation of state and federal jurisdiction can be traced to the difficulty of defining intrastate communications,[87] and ultimately to the nature of the telephone system itself. Each telephone is designed to reach virtually any other telephone in the exchange, state, and nation. There is no technological bright line dividing the telephone network into separate compartments at state boundaries. Many, and perhaps most, of the telephone industry's facilities, practices, and regulations affect both intrastate and interstate traffic,[88] even though interstate calls have historically accounted for only approximately three percent of the total traffic transmitted over equipment shared by intrastate and interstate callers.[89] Unfortunately, the statutory language adopted appears to ignore technological interconnection by absolutely dividing jurisdiction[90] between state regulators, who are to control intrastate communication service,[91] and the Commission, which may regulate all interstate communications.[92] To the frustration of some telephone industry representatives, the Act's drafters included no solution to the problem of defining interstate business.[93] No pat formula defining interstate and intrastate communication was provided because none was available.[94] The courts have struggled to sort out the intended division of jurisdiction ever

85. *See* Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 698-99 (1st Cir. 1977).

86. 47 U.S.C. § 152(b)(1) (Supp. IV 1980) (emphasis added).

87. Diamond Int'l Corp. v. FCC, 627 F.2d 489, 492-93 (D.C. Cir. 1980).

88. *See* Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699 (1st Cir. 1977).

89. Petition for Cert. at 6, *NCUC I*, 429 U.S. 1027 (1976). Although the amount of interstate toll usage may have grown in recent years, it remains small in relation to intrastate traffic. *See* Comments of the New York State Department of Public Service at 4-5, Fourth Supplemental Notice, *supra* note 19.

90. *See* Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699 (1st Cir. 1977).

91. 47 U.S.C. § 152(b) (Supp. IV 1980).

92. *Id.* § 152(a) (1976).

93. *See* 1934 *Senate Hearings*, *supra* note 48, at 138-40 (statement of F. B. MacKinnon, President, United States Indep. Tel. Ass'n: "There is still left that undecided question as to when a company is engaged in interstate business.").

94. *See, e.g., id.* at 88-90 (statement of Walter S. Gifford, President, AT&T: "[A]ny line that you suddenly telephone over from your telephone to anywhere in another State is an interstate line while it is so being used.").

HeinOnline -- 1983 BYU L. Rev. 391 1983

since.

Disputes have arisen most often when states have attempted to reserve jurisdiction over telecommunications equipment located on the subscriber's premises. Although the equipment is located within the local exchange, it can, of course, affect interstate communications originating and terminating within the exchange. Disagreements over the regulation of this equipment date back nearly forty years.[95] However, they have arisen with greater frequency as federal regulators have been increasingly willing to recognize that competition alone may serve as an efficient regulator. Thus, with a weather eye toward the increasingly competitive dynamics of long distance service and customer equipment sales, the Commission has gradually changed course 180 degrees on many of its policies. State commissions have not always been disposed to strike out in these new directions, particularly when they have viewed the Commission's procompetitive policies as impinging on areas previously thought to be primarily under state control. A flurry of litigation has resulted, including *NCUC I*, *NCUC II*, and *Puerto Rico Telephone*.[96]

Courts navigating the area have developed several guidelines. The key to a permissible exercise of federal jurisdiction is the nature of the communication, not the location of the equipment.[97] The origination and termination are considered part of an interstate communication.[98] Thus, whether the plant is physically located in the exchange or interexchange system, "those facilities or services that substantially affect provision of interstate communication are not deemed to be intrastate in nature even though they are located or provided within the confines of one state."[99]

Federal authority to regulate equipment used for both interstate and intrastate traffic prevails over state powers, even though the facilities are predominantly employed to make intra-

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95. *See, e.g.*, Use of Recording Devices in Connection with Telephone Service, 11 F.C.C. 1033 (1947).

96. *NCUC I*, 537 F.2d 787; *NCUC II*, 552 F.2d 1036; *Puerto Rico Tel. Co.*, 553 F.2d 694.

97. New York Tel. Co. v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980). *Accord* United States Dep't of Defense v. General Tel Co. of the Northwest, 38 F.C.C.2d 803 (1973).

98. United States v. AT&T, 57 F. Supp. 451, 454-55 (S.D.N.Y.), *aff'd sub nom.* Hotel Astor, Inc. v. United States, 325 U.S. 837 (1945).

99. Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1109 n.85 (D.C. Cir. 1981).

HeinOnline -- 1983 BYU L. Rev. 392 1983

state calls.[100] The emerging rule recognizes that facilities and services are only *intrastate* and reserved to exclusive state jurisdiction to the extent they (a) can be practically separated from interstate facilities and services and (b) do not substantially affect the conduct or development of interstate communications.[101]

At least one court has applied these principles to uphold federal control over interstate access charges for private line exchange service, making it virtually certain that the Commission has jurisdiction to set interstate access charges under the Modified Final Judgment. In *New York Telephone Co. v. FCC*[102] the United States Court of Appeals for the Second Circuit recognized the Commission's jurisdiction over local exchange service when used in connection with interstate foreign exchange (FX)[103] and common control switching arrangement (CCSA) services.[104] The dispute was triggered when the state public service commission partially shifted the allocation of exchange access costs from local exchange users to FX and CCSA subscribers; it then applied the resulting surcharge only to interstate customers. When the telephone company filed a state tariff to recover its annual revenue requirements associated with the reallocated access charges, the FCC disallowed the tariff. The Second Circuit rejected the telephone company's argument that the FCC had exceeded its authority to prevent state discrimination against interstate users. Noting that the FCC's jurisdiction does not end at the local switchboard, it concluded that the "general thrust" of the statutes and case law clearly supported federal jurisdiction.[105]

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100. Southern Pac. Communications Co. v. Corporation Comm'n, 586 P.2d 327, 333 (Okla. 1978).

101. *NCUC II*, 552 F.2d at 1046. *See also* California v. FCC, 567 F.2d 85, 89 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699 (1st Cir. 1977); Southern Pac. Communications v. Corporation Comm'n, 586 P.2d 327, 333 (Okla. 1978).

102. 631 F.2d 1059, 1064-67 (2d Cir. 1980).

103. Through use of a private line, FX service provides the subscriber with the local dial tone of a distant exchange. *See* Petition for Certiorari at 4, California v. FCC, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

104. The exchange carrier uses its local premises to provide private branch exchange (PBX) service to customers subscribing to CCSA. *Id.*

105. *Id.* at 1065-66. *Accord* Second Supplemental Notice of Inquiry and Proposed Rulemaking, MTS and WATS Mkt. Structure, 77 F.C.C.2d 224, 236 (1980) (discussing the prescription of charges for MTS/WATS interstate access to local exchanges, and noting referral to joint board of issues concerning jurisdictional separation of exchange plant costs).

HeinOnline -- 1983 BYU L. Rev. 393 1983

New York Telephone clearly supports the Commission's authority to implement a system of nationwide interstate access charges. An attempt to limit the holding to a justification of federal intervention in access charge regulation only when states apply rates discriminatorily against interstate customers[106] is not likely to succeed, since the court clearly grounded its decision on the general jurisdictional statutes in the Act.[107] Additionally, that the fees concerned access to private lines is not significant. The Commission has held that for purposes of ordering interconnection, it does not distinguish between private and public lines; interconnection may be ordered if the line provides a link in "the flow of uninterrupted signals across state lines."[108] The same reasoning is applicable to the regulation of fees for exchange access.

Before the divestiture the Commission regulated exchange access fees paid by non-AT&T common carriers providing competing interstate long distance services.[109] The Commission is currently considering the best method of implementing postdivestiture nationwide interstate access charges for all carriers subject to its jurisdiction.[110] The Commission's authority to proceed in these areas is consistent with a series of earlier decisions in which it has upheld its own jurisdiction over interstate services from "end-to-end"[111] in the face of arguments that its jurisdiction stops where exchange plant begins. These administrative constructions of the Act are generally entitled to great deference.[112] In its decision *Use of Recording Devices in Connection with Telephone Service*,[113] the Commission early asserted jurisdiction over foreign attachments to the telephone network, even though the attachment was made at the handset level, a basic part of the exchange. Subsequent decisions continued to uphold the Commission's jurisdiction over these attach-

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106. *See* 47 U.S.C. §§ 202-203 (1976). Section 202 prohibits, inter alia, "discrimination in charges, practices, classifications . . . or services." *Id.* § 202(a).

107. New York Tel. Co. v. FCC, 631 F.2d 1059, 1064-65 (2d Cir. 1980).

108. AT&T, 71 F.C.C.2d 1, 8 (1979).

109. Exchange Network Facilities for Interstate Access (ENFIA), 71 F.C.C.2d 440 (1979).

110. *See* Fourth Supplemental Notice, *supra* note 19, at 26, 670-75.

111. 1 *Hearings*, *supra* note 19, at 632 (statement of Mark Fowler, Chairman, FCC).

112. General Tel. Co. of Cal. v. FCC, 413 F.2d 390, 401 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

113. 11 F.C.C. 1033, 1045-47 (1947).

HeinOnline -- 1983 BYU L. Rev. 394 1983

ments.[114] The Commission has also required a single rate to be filed with the FCC for teletypewriters used interchangeably for interstate and intrastate communications.[115]

The Commission has steadfastly refused to abdicate a large portion of the jurisdiction it has read into the Act;

> We find nothing in section 2(b)(1) which imposes any limitation upon our full authority over interstate communication service. For us to conclude that, because the facilities or instrumentalities are used in intrastate as well as in interstate communications service, we do not have jurisdiction, or that we should not exercise it, would leave a substantial portion of the interstate communication service unregulated. We do not believe the Congress so intended.[116]

The Commission held in *United States Department of Defense v. General Telephone Co. of the Northwest*[117] that it could require tariff filing for the interstate usage of dial restoration panels,[118] even though some panels operated entirely within one state. Very recently, the Commission has asserted jurisdiction over several areas in the regulation of cellular radio,[119] reasoning in part that this essentially local service will be interconnected into the interstate telephone network.[120] Although parties occasionally pick apart the Commission's decisions to find interpretations suggesting that its jurisdiction does not extend over certain aspects of exchange regulation, the courts seem willing to accept the Commission's expurgation of any minor deviations in its construction of the Act.[121]

Are these decisions correct to the extent they exclude state

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114. Use of the Carterfone Device in Message Toll Tel. Serv., 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968); Hush-A-Phone Corp. v. AT&T, 22 F.C.C. 112 (1957).

115. AT&T, 38 F.C.C. 1127 (1965).

116. *Id.* at 1133. *See also* Katz v. AT&T, 16 F.C.C. 421, *reh'g denied*, 43 F.C.C. 1328 (1953). *See generally* Telerent Leasing Corp., 45 F.C.C.2d 204, 218-20 (1974).

117. 38 F.C.C.2d 803, 816 (1973).

118. Dial restoration panels were devices intended to restore manual interconnection of telephone lines rapidly after an emergency disrupted service over regular lines. *Id.* at 805.

119. Cellular mobile radio telecommunication utilizes computer coordinated reuse of a group of radio channels linked with the local exchange and switching equipment to provide a mobile radio service with a high capacity to serve subscribers. *See* 47 Fed. Reg. 10,018, 10,033-34 (1982).

120. *Id.*

121. *See, e.g.*, New York Tel. Co., 76 F.C.C.2d 349, 354 n.8 (1980), *aff'd*, New York Tel. Co. v. FCC, 631 F.2d 1059 (2d Cir. 1980).

HeinOnline -- 1983 BYU L. Rev. 395 1983

jurisdiction over the fees to be charged to interstate callers for access to local exchange services? The answer turns on one's reading of the Act's legislative history and the flexibility built into its scheme of jurisdiction. The Act can be viewed as having permanently fixed the allocation of jurisdiction in place as it existed in 1934, reserving to states jurisdiction over future developments arguably local in nature.[122] However, this view is contrary to the courts' willingness to interpret the Act as an expansive congressional mandate which may, within limits, respond to new developments in the telecommunications industry.[123] Additionally, federal regulation of interstate access charges is closely analogous to the Commission's admittedly primary authority in the separations and settlements procedures.[124] Section 2(b)(1) does not justify the exclusion of the Commission from regulation of interstate access fees.

3. *Section 2(b)(2): connecting carriers*

One section in the Act allocates jurisdiction, not in terms of the interstate/intrastate division, but on the basis of the communications carrier's status. Section 2(b)(2) excludes "connecting carriers" from federal jurisdiction.[125] A connecting carrier is "any carrier engaged in interstate or foreign communication *solely through physical connection with the facilities of another [unaffiliated] carrier.*"[126] Cases provide little explanation of the stautory language,[127] but presumably any carrier that (a) owns no exchange plant, wires, or other communications facilities that cross state lines, and (b) is not affiliated with the longlines carrier that transports traffic to neighboring states qualifies as a

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122. *See, e.g., NCUC I*, 537 F.2d at 796-99 (Widener, J., dissenting).

123. *See* Southwestern Cable Co. v. United States, 392 U.S. 157 (1968); Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220, 224-25 (D.C. Cir. 1967).

124. *See* S. REP. No. 362, 92d Cong., 1st Sess. (1971), *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 1511, 1513, 1515:

> [T]he Federal Government preempts the States in the area of Federal jurisdiction. Thus, if the Commission declares its rate based to include certain costs, these costs are not used in determining a State's rate base . . . .
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> . . . .
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> . . . The provisions of H.R. 7048 would achieve the purpose of joint participation without abandoning Federal superintendence in the field.

See also 47 U.S.C. § 221(c) (1976).

125. 47 U.S.C. § 153(u) (1976); *id.* § 152(b)(2) (Supp. IV 1980).

126. *Id.* § 152(b)(2) (Supp. IV 1980) (emphasis added).

127. *See, e.g.*, Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Comtronics, Inc. v. Puerto Rico Tel. Co., 409 F. Supp. 800 (D.P.R. 1975).

HeinOnline -- 1983 BYU L. Rev. 396 1983

connecting carrier. All telephone companies that now qualify as connecting carriers will not generally be required to file access charge tariffs with the Commission, even for interstate traffic. Connecting carriers will presumably negotiate independently with those carriers offering to provide connecting carriage to other cities,[128] although they may file tariffs if they desire.

It can be argued that the Modified Final Judgment transforms the BOCs into connecting carriers under section 2(b)(2).[129] The Modified Final Judgment prohibits BOCs from offering any telecommunications services between exchanges.[130] BOCs may only provide intraexchange and access services that are natural monopolies.[131] Since exchanges will not generally straddle state lines, BOCs could be considered connecting carriers under section 2(b)(2), exempt from control by the FCC.

As parties to the Modified Final Judgment, BOCs will of course be bound by provisions of the judgment. To this extent they may be required to file tariffs for the provision of exchange access under the terms of the judgment.[132] However, since the judgment was not intended to shift the jurisdictional allocations under the Act, the judgment cannot affirmatively compel BOC obeisance to the full panoply of federal authority if BOCs are otherwise exempted under the Act.

A connecting carrier does not remain subject to sections 201-205 of the Act governing mandatory interconnection and rate hearings.[133] BOCs would thus be subject to federal rate regulation even if not required to file tariffs. However, no section in the Act subjects carriers to the Commission's jurisdiction under section 221(c) to prescribe separations.[134] The Commission could potentially lose control over millions of dollars of assets now allocated to interstate revenue requirements.

Apparently the FCC has considered the argument that BOCs may be section 2(b)(2) carriers exempt from its jurisdic-

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128. *Joint Hearings*, *supra* note 39, at 103 (statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Dep't of Justice).

129. *Id.* at 42 (statement of Rep. Wirth).

130. Modified Final Judgment, *supra* note 1, at 227-28.

131. *Id.*

132. *Id.* at 232-33.

133. *See* 47 U.S.C. § 152(b)(2) (Supp. IV 1980); *id.* §§ 201-205 (1976); GTE Service Corp. v. FCC, 474 F.2d 724, 736 (2d Cir. 1973); Fallon Travelodge, 14 F.C.C.2d 972 (1968).

134. 47 U.S.C. § 221(c) (1976).

HeinOnline -- 1983 BYU L. Rev. 397 1983

tion.[135] It has concluded, at least preliminarily, that its jurisdiction is "necessary to [its continued] superintendency of the national phone network."[136] However, it is doubtful that Congress intended the Commission to exercise authority over the nation's phone network in violation of the express limitations of sections 2(b)(1), 2(b)(2), and 221(b). The Commission has also suggested that its ratemaking authority under sections 201-205 would be frustrated unless its section 221(c) separations jurisdiction were read into section 2(b)(2) as an additional jurisdictional obligation placed upon connecting carriers. While a plausible argument, it fails to account for the fact that non-BOC connecting carriers seem to be currently exempt from participation in the settlements process.

It is problematical whether the Act's legislative history can help resolve the question, since the drafters certainly did not foresee the restructuring of AT&T created by the Modified Final Judgment. Cases indicate a reluctance to completely disallow a connecting carrier's status, at least when section 2(b)(2) carriers have engaged in the provision of cable-related services and thus brought themselves within federal jurisdiction exercised over the construction of facilities to provide cable-related services.[137] Another holding suggests that a connecting carrier may properly choose to terminate all connection with interstate carriers, thus removing itself completely from federal jurisdiction.[138] These decisions suggest that the courts are willing to recognize the substantial limits placed by Congress on the federal regulation of 2(b)(2) carriers.

On the other hand, section 2(b)(2) was added to the Act for the express purpose of protecting smaller, independent telephone companies.[139] The spun-off BOCs, which will probably be controlled by large regional holding companies, hardly seem to fit that description. Although they will not be affiliated with the

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135. *See* 1 *Hearings*, *supra* note 19, at 656 (statement of Gary Epstein, Chief, Common Carrier Bureau, FCC).

136. 1 *Hearings*, *supra* note 19, at 656 (statement of Rep. Wirth).

137. General Tel. Co. of Cal. v. FCC, 413 F.2d 390, 402 n.19 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969). *Accord* General Tel. Co. of Southwest v. United States, 449 F.2d 846, 855 (5th Cir. 1971).

138. United Tel. Co. of the Carolinas v. FCC, 559 F.2d 720, 720-22 (D.C. Cir. 1977).

139. 78 CONG. REC. 8846 (1934) (statement of Senator Clark); *see also* National Ass'n of Regulating Util. Comm'rs v. FCC, 533 F.2d 601, 635 n.22 (D.C. Cir. 1976) (Lumbard, J., concurring); General Tel. Co. of Cal. v. FCC, 413 F.2d 390, 402 n.19 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

HeinOnline -- 1983 BYU L. Rev. 398 1983

interexchange carrier, they will in many instances be directly affiliated with the exchange carrier at the other end of the interexchange traffic. By commonly owning exchange plant in multiple states, it can be argued that BOCs provide a type of interstate telephone service *not* rendered solely through interconnection with the facilities of another carrier.

Even if a BOC were unaffiliated with any other out-of-state carrier, exemption from federal jurisdiction would probably not be necessary to protect the BOC from an overwhelming federal jurisdiction out of proportion to the services it renders. Nor would an extension of federal jurisdiction overburden the Commission with administrative responsibilities having a de minimis impact on its overall statutory mandate.[140] Thus, a narrow construction of section 2(b)(2) to preclude BOCs from qualifying as connecting carriers will not impair the primary policies that prompted Congress to include section 2(b)(2) in the Act. The Commission's tentative conclusion that it has jurisdiction over BOCs should be supported.

D. Exclusive Federal Jurisdiction over Access Charges

Stepping back to view the entire range of decisions broadly construing federal authority over exchange telecommunications, one gains a dizzying perspective on the increasing breadth of the Commission's power. During the past two decades the Commission has gradually and inexorably acted to allow competition in the provision of customer premises equipment and interstate long distance services.[141] A quick glance at the score card shows that most courts are extremely reluctant to strike down a federal assertion of jurisdiction over any aspect of telecommunications arguably related to interstate traffic. The emerging rule reserves to exclusive state jurisdiction only those facilities "separable from *and* . . . not substantially affect[ing] the conduct or development of interstate communications."[142]

All interstate calls must be processed through the local exchange. Exchange plant is costly and cannot be duplicated to provide separate systems for interstate and intrastate calls. Most

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140. General Tel. Co. of Cal., 14 F.C.C.2d 695 (1968). *See also* General Tel. Co. of Cal. v. FCC, 413 F.2d 390, 402 n.19 (D.C. Cir.), *cert. denied*, 396 U.S. 888 (1969).

141. *See generally* Motion to Affirm (for Western Electric Co. v. AT&T) at 4-5, Maryland v. United States, 103 S. Ct. 1240 (1983).

142. *NCUC I*, 537 F.2d at 793; *see supra* note 101.

HeinOnline -- 1983 BYU L. Rev. 399 1983

state exchange regulation can directly affect the quality of exchange service and has ultimate potential of substantially affecting the placement of interstate calls. There has thus been some concern among state commissions that the FCC's regulation of interstate access charges could be used to preempt state regulation of interexchange intrastate access fees.[143] The Commission could find that adverse intrastate access rates were having a negative impact on interstate traffic patterns. Or, it could charge that an independent carrier holding a franchise monopoly on intrastate long distance service[144] was obtaining an unfair advantage in interstate long distance competition because of savings resulting from intrastate access charges set lower than the comparable federal interstate access fees. Any number of other policy factors could spur the FCC to preempt state regulation of access fees. However, an attempted preemption would almost certainly be challenged by state commissions.[145]

No courts have yet considered this specific issue. In an effort to preclude extreme assertions of federal jurisdiction, *NCUC I* and *NCUC II* attempted to carve out an area of exclusive state jurisdiction consistent with congressional intent under the Act. These cases suggested that state ratemaking might be an area "separable" from federal jurisdiction.[146] To the extent determinations of intrastate interexchange access charges can be termed intrastate ratemaking, this area of regulation might remain immune from federal preemption.

However, subsequent cases have not recognized this distinction.[147] In *Computer and Communications Industry Association v. FCC*[148] the District of Columbia Circuit considered the validity of an FCC order that states discontinue rate regulation of customer premises equipment. The states challenged the federal decision as an impermissible preemption of state ratemaking au-

143. *See* Comments submitted jointly on behalf of the Public Utility Commission of Idaho, Montana, Nebraska, New Mexico, South Dakota, Utah and Wyoming, at 17-20, Fourth Supplemental Notice, *supra* note 19.

144. The Modified Final Judgment generally does not forbid states to regulate intrastate monopoly service. With the exception of non-BOC carriers, the judgment "in no way interferes with a state's power, with respect to telecommunications markets within the state's jurisdiction, to substitute its regulation for competition." Motion to Affirm (for Department of Justice) at 23-24, Maryland v. United States, 103 S. Ct. 1240 (1983).

145. *See* Swift Letter, *supra* note 42, at 2.

146. *See NCUC II*, 552 F.2d at 1047; *NCUC I*, 537 F.2d at 793.

147. *See, e.g.*, New York Tel. Co. v. FCC, 631 F.2d 1059, 1064-66 (2d Cir. 1980).

148. 693 F.2d 198 (D.C. Cir. 1982).

HeinOnline -- 1983 BYU L. Rev. 400 1983

thority.[149] The court rejected this challenge. It held that the Act "does not distinguish between authority over rates and authority over other aspects of communications. Sections 2(a) and 2(b) of the Act allocate federal and state authority with regard to both '*charges* [and] . . . facilities.' "[150] Thus, when state ratemaking "impede[s a] validly adopted federal policy," then the rate regulation is preempted.[151]

Although this decision is undoubtedly a correct statement of general principles governing federal preemption of inconsistent state regulation,[152] it is difficult to reconcile with the intent of the Act's drafters to avoid eviscerating traditional state regulatory powers. As an absolute minimum, it is clear that the Act was intended to prevent federal preemption of intrastate rates on the ground that intrastate rates discriminated against interstate users under the *Shreveport* ruling.[153]

However, the statements of the Act's principal proponents suggest that Congress did not intend to backhandedly permit any extreme assertion of federal jurisdiction that fell just short of the *Shreveport* mark. Rather, Congress intended to grant to state commissions the de facto authority over local telephone service that the commissions then enjoyed. Representatives of the National Association of Regulatory Utility Commissioners (NARUC), explained the reasons for their general support of the Act: "We endorse the principle of this bill, because it specifically reserves to the State Governments their rightful powers over matters *of purely State concern, such as so-called exchange or local rates of telephone companies.*"[154] Further,

> [w]e have approached this bill [to see to it that] because of its local character, the State regulatory bodies are well protected by the express provisions of the language, *and are not ousted from their jurisdiction.*
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> . . . .

149. *Id.* at 215-16.

150. *Id.* at 216 (quoting from 47 U.S.C. § 152(b)(1) (Supp. IV 1980).

151. *Id.*

152. *See* Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 102 S. Ct. 3014, 3022-23 (1982).

153. *See* 78 CONG. REC. 8823 (1934) (statement of Sen. Dill); 1934 *Senate Hearings*, *supra* note 48, at 154-55 (statement of K.F. Clardy, Chairman, Legislative Committee, NARUC); *id.* at 178-79 (statement of John E. Benton, General Solicitor, NARUC).

154. 1934 *Senate Hearings*, *supra* note 48, at 156 (statement of Andrew R. McDonald, First Vice President and Executive Committee Chairman, NARUC) (emphasis added).

HeinOnline -- 1983 BYU L. Rev. 401 1983

> . . . The State commissions believe that since it is primarily a State problem, the small percent that is interstate in character *only* should be regulated by the Federal Government, and that *in the enactment of this measure* great care should be taken to see to it *that the Congress does not destroy the present regulation now in effect by the States by taking away from the States any of the powers they now exercise.*[155]

Congress recognized that state commissions were anxious to limit federal authority to "override and interfere with State regulation."[156] After stating that the Act was intended to avoid the *Shreveport* result, Senator Dill continued, "We have attempted, in this proposed legislation, to safeguard State regulations by certain *provisions* to the effect that *where existing intrastate telephone business is being regulated by a State commission, the provisions of the bill shall not apply.* We have in mind, *for instance,* [section 221(b)]."[157]

Often, incremental increases in federal jurisdiction seem reasonable in the context of a specific decision. But when added together, they must eventually cross the limit from the permissible to the impermissible. A Commission order preempting state authority to set intrastate access rates according to state policies should be outside the Commission's jurisdiction. Such an order would contradict the *Shreveport* limit built into the Act, which is intended to permit state control over local rates even when detrimentally affecting federal policies and interstate users. A Commission preemption would also contravene the drafters' intent to guarantee fairly broad state control over local exchange rates and services. The holding of *Computer and Communications Industry Association* may be justified on the assumption that the Act's drafters could not have foreseen the explosive growth of the customer premises equipment market and therefore could not have intended to reserve control over this market to the states. However, the drafters clearly did consider the problem of local exchange rate regulation. Accordingly, *Computer and Communications Industry Association* should not be extended to allow federal preemption of intrastate access charges, absent legislative modification of the Act.

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155. *Id.* at 153-54 (statement of K.F. Clardy). *See also id.* at 156 (statement of Andrew R. McDonald) (emphasis added).

156. *Id.* at 154 (statement of Sen. Dill).

157. 78 CONG. REC. 8823 (1934) (statement of Sen. Dill) (emphasis added).

HeinOnline -- 1983 BYU L. Rev. 402 1983

III. The Future of Control over Access Charges

A. The Need for Legislative Clarification

If frequency of litigation is any gauge, state commissions have generally not been pleased with increasing federal involvement in the regulation of exchanges. Shortly after *NCUC I*, several bills were introduced in Congress for the purpose of reserving to the states all jurisdiction over the regulation of terminal equipment.[158] The New York Department of Public Service has commented to the Commission that legislation should be devised to place the regulation of all exchange services offered to interexchange carriers clearly within state jurisdiction.[159] Other regulators agree that current statutes and case law provide practically no guarantee of state sovereignty over many aspects of telecommunications previously thought to be within state jurisdiction.[160]

There is widespread agreement that a legislative clarification of current state and federal jurisdictional boundaries is long overdue, although there is equally widespread disagreement over the best allocation of jurisdiction. Representative Timothy Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection, and Finance, has proposed legislation to overhaul existing demarcations of jurisdiction.[161] FCC Chairman Mark Fowler has indicated he would prefer to see the Commission's authority clarified in the light of the Modified Final Judgment.[162] State commissions are concerned about the time and money currently wasted in litigation over state and federal authority to control telecommunications policy and practices.[163]

This unrest is not surprising. Controversy over the regulation of access charges is a symptom of the growing clash between the Act's historic apportionment of jurisdiction, as understood by the states, and the current need to implement new nationwide policies, as determined by the Commission. The telecom-

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158. *See* Opposition to Petition for Cert. at 5 n.14, *NCUC I*, 429 U.S. 1027 (1976).

159. *See* Comments of the New York State Department of Public Service at 3, Fourth Supplemental Notice, *supra* note 19.

160. *See* Addison Letter, *supra* note 23, at attachment I.

161. H.R. 5158, 97th Cong., 2d Sess. (1982); *see* 1 *Hearings*, *supra* note 19, at 627.

162. 1 *Hearings*, *supra* note 19, at 632-34.

163. Addison Letter, *supra* note 23, at attachment I; *see also* 1 *Hearings*, *supra* note 19, at 299 (statement of Edythe S. Miller, Chairwoman, Colorado Public Utilities Comm'n).

HeinOnline -- 1983 BYU L. Rev. 403 1983

munications industry is cracking out of its chrysalis; state and federal regulators cannot be expected to catch this creature with the antiquated tweezers of the Act—a comprehensive net is now required.

B. Policy Guidelines

Certain policy considerations are self-evident. Any system of access charges should be efficient and practically constructed to process tarrifs filed for thousands of exchanges. Jurisdictional lines should be clearly specified and aligned as closely to logical technological divisions as possible, so that regulatory conflict and overlap will be minimized. The system of access charge jurisdiction should also be designed with an eye toward the substantive rules governing imposition of access charges. For example, the extent of nationwide averaging of charges may suggest whether a state or federal regulator is in the better position to implement the system.

Other more difficult policy choices will have to be made. The degree to which universal service and intra-industry competition are favored will have a great bearing on the most suitable allocation of state and federal jurisdiction over access charges. Widespread subscription to telephone service can generally be expected to continue as rates remain low. The ability of state regulators to use access charges as a tool to hold down exchange rates may be an important aid in promoting more use of basic telephone service.[164] Responsive, locally tailored regulation is also important in assuring adequate service to local exchange users.

Yet, other aspects of the public interest are served by heightened competition and economically efficient pricing policies. Ease of entry into interexchange service, fewer numbers of regulations and regulators, and the consistency of regulation with technology may increase the long-range public benefit from advances in telecommunications technology. But the tensions between universal service and rate regulation based on actual costs are obvious: absent price supports, many interexchange carriers may be unwilling to serve economically unprofitable areas.

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164. *See* 3 *Hearings*, *supra* note 19, at 812 (statement of George H. Barbour, Past President, New Jersey Bd. of Pub. Utils.); *see id.* at 819, 856 (statements of Paul L. Gioia, Chairman, New York State Public Service Comm'n).

HeinOnline -- 1983 BYU L. Rev. 404 1983

Arguing in favor of continued or increased control over access charges, states contend that practically and administratively they are better situated to regulate large numbers of exchanges.[165] Legitimately, they also assert a greater familiarity with the needs to be served by exchange access charges.[166] The specific, tailored consideration of access charges by locally oriented commissions is, they argue, more likely to produce better results.[167] State jurisdiction over access charges would recognize and efficiently use the expertise of state commissions in handling local ratemaking matters.[168] Responding to concern that local regulation would result in balkanization,[169] states are generally not adverse to regulating access tariffs within federal guidelines.[170]

These arguments are contested by those who would allow federal jurisdiction over all interexchange access charges. The Commission could continue to support low exchange rates through access revenues if the Commission concluded rate support was necessary. Further, economists and the interexchange industry have argued persuasively before Congress that access charge revenues could be diverted from exchanges without harming basic service.[171] Additionally, some economic studies have shown that subscriptions to telephone service are much more inelastic than has been assumed.[172]

State commissions are characterized as subject to political pressure to keep exchange rates artifically low and less able to

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165. *See* 1 *Hearings*, *supra* note 19, at 191 (statement of Joseph P. Cresse, Chairman, Florida Pub. Serv. Comm'n); *id.* at 206, 214-15 (statements of Edward B. Hipp, Commissioner, North Carolina Utils. Comm'n); *id.* at 236-37 (statement of Rep. Wirth).

166. *See* Comments of Pennsylvania Pub. Util. Comm'n, Fourth Supplemental Notice, *supra* note 19.

167. 1 *Hearings*, *supra* note 19, at 196-97 (statement of Joseph P. Cresse); *id.* at 236-37 (statement of John E. Bryson, President, California Pub. Utils. Comm'n); *id.* at 279 (statement of Richard C. Loux, Chairman, Kansas State Corp. Comm'n); Comments of the Florida Public Service Commission at 9-10, Fourth Supplemental Notice, *supra* note 19.

168. 1 *Hearings*, *supra* note 19, at 315 (statement of Susan M. Shanaman, Chairwoman, Pennsylvania Pub. Util. Comm'n).

169. *See id.* at 235 (statement of Rep. Wirth).

170. *Id.* at 236-37 (statement of Eric J. Schneidewind, Chairman, Michigan Pub. Serv. Comm'n).

171. *See* 3 *id.* at 385-86, 414, 425-26 (statements of William G. McGowan, Board Chairman, MCI Communications Corp.); *id.* at 572, 576 (statements of John C. LeGates, Director, Program on Information Resources Policy, Harvard University).

172. *See id.* at 572 (statement of John C. LeGates).

HeinOnline -- 1983 BYU L. Rev. 405 1983

produce an efficient, uniform system of charges.[173] Most significantly, continuation of state jurisdiction is viewed as a primary inhibitor of federal procompetitive policies. Increasing the number of regulatory bodies tends to increase barriers to entry in the market,[174] as does the economically artifical bifurcation of rates into intrastate and interstate spheres.[175] Federally oriented administration of access charges is more likely to be consistent with the competitive interstate telecommunications market contemplated by the Modified Final Judgment.

Future legislators should carefully consider these positions and, in the context of the general national telecommunications policies adopted, allocate jurisdiction over access charges in the manner most likely to promote the efficient regulation necessary to achieve the legislative objectives. Certainly the history of jurisdictional-related litigation under the Act teaches that the distinction between interstate and intrastate communications is illusory. In our nation's system of cooperative federalism, state lines can never be considered totally arbitrary. But by narrowly focusing on the interstate/intrastate dichotomy, attention is diverted from the more fundamental question of which regulator is in the better position to administer a particular aspect of telecommunications policy, to the unproductive inquiry of whether a service or facility substantially affects interstate communications. Since very few facilities can in fact be separated from the plant used to route interstate traffic, state regulators will invariably be confined to an increasingly subordinate role whenever federal policies clash with state regulatory interests. Because of federal supremacy, state jurisdiction is likely to continue shrinking as long as the states, the Commission, and the courts continue to conceptualize state and federal jurisdiction as two separate spheres of plenary authority.

Future congressional action should eschew this approach. Attempts to define interstate communication are no more likely to be successful now than in 1934. Legislation should clearly centralize authority over significant policy issues and those technical standards necessary to maintain integration of the nation's

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173. *See id.* at 350 (statement of Dale F. Pilz, President, Southern Pac. Communications Co.).

174. *See id.* at 158 (statement of Fred S. Lafer, Senior Vice President, Automatic Data Processing); *id.* at 324 (statement of James K. Devlin, President and Chairman of the Board, U.S. Tel. Communications, Inc.); *id.* at 350 (statement of Dale F. Pilz).

175. *See id.* at 391, 430 (statements of William G. McGowan).

HeinOnline -- 1983 BYU L. Rev. 406 1983

phone network. Centralization of control over policy should be matched by a substantial delegation of practical decisionmaking power to the states, granting states the flexibility to tailor local exchange services to the particular requirements of the localities they serve. The provisions governing access charges contained in H.R. 5158[176] were designed along similar lines, and commanded the support of many state commissions.[177] This bill should serve as a starting point, at least, for future legislation. Although this legislation may seem potentially inconsistent with immediate state interests, the long-term vigor and effectiveness of state commissions will probably be best achieved through this type of jurisdictional allocation.

IV. CONCLUSION

By replacing the current settlements procedures with a system of exchange access fees, the Modified Final Judgment has focused new attention on the question of control over exchange access. On the correct assumption that the Modified Final Judgment cannot alter state and federal allocations of jurisdiction, state commissions are preparing to regulate intrastate interexchange access fees, while the FCC is deciding the best method for implementing interstate interexchange access fees.

As interpreted by recent cases involving regulation of private line access and attachment of terminal equipment, sections 2(b)(1), 2(b)(2), and 221(b) of the Communications Act of 1934 support this current division of jurisdiction. Federal regulation of interstate access fees is thus not open to challenge by state commissions. Federal attempts to preempt state regulation of intrastate exchange access charges are inconsistent with the legislative history of the Act; consequently, federal preemption in

176. STAFF OF HOUSE SUBCOMM. ON TELECOMMUNICATIONS, CONSUMER PROTECTION, AND FINANCE, H.R. 5158, TO AMEND THE COMMUNICATIONS ACT OF 1934 TO REVISE PROVISIONS OF THE ACT RELATING TO TELECOMMUNICATIONS, AND FOR OTHER PURPOSES, as Reported to the House Energy and Commerce Comm. on March 25, 1982 (Comm. Print April 8, 1982) (as amended during mark-up in the House Energy and Commerce Comm.); Comments of the Florida Public Service Comm'n at attachment A, Fourth Supplemental Notice, *supra* note 19 (amendment to Committee Print of H.R. 5158 of April 8, 1982, offered by Rep. Dingell).

177. *See, e.g.*, Comments of the Florida Public Service Comm'n at 1-3, Fourth Supplemental Notice, *supra* note 19. Informally, one state official suggested that his state might favorably consider a relinquishment of intrastate interexchange jurisdiction if states were given authority to set all exchange access charges under broad federal guidelines. Malone Letter, *supra* note 42, at 2.

HeinOnline -- 1983 BYU L. Rev. 407 1983

this area should not be upheld.

Recent developments in telecommunications technology and regulatory policy coupled with frequent litigation pressed by displaced state commissions have underscored the need for legislative clarification of state and federal jurisdictional boundaries. Proposals for change are almost as ubiquitous as the telephone handset itself. Federally centralized policymaking on matters of national concern, accompanied by substantial delegation of administrative authority to states, could provide a stable balance between the state interest in responsiveness to local needs and the federal interest in uniform policies uniformly administered. If the regulatory scheme eventually adopted is not adaptable to the changing demands of the metamorphosing telecommunications industry, then state and federal regulators, the industry itself, and ultimately consumers will continue to suffer from the friction generated by an inflexible and inadequate statutory mandate.

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HeinOnline -- 1983 BYU L. Rev. 408 1983