2003

Cooperative Federalism and Its Challenges

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2003 MICH. ST. DCL L. REV. 727

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INTRODUCTION

For most telecommunications industry participants, the attraction of using federalism arguments opportunistically is irresistible. For those championing a forward-looking cost methodology to price access to unbundled network elements in 1996, the Federal Communications Commission (FCC) needed to mandate a national pricing standard that left little discretion to state agencies. For those arguing for liberal unbundling rules in 2003, it was critical that the FCC allow for state discretion in the development of unbundling rules and not endorse a national set of rules. As is often the case in the telecom policy wars, the regulatory federalism arguments made in these cases were mostly result-oriented: those who argued against state discretion in the development of cost methodologies–the new entrants into the local telecommunications market–were the same entities who argued for such discretion in developing unbundling policy (and vice versa).

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* Thanks to Ray Gifford and Jon Nuechterlein for helpful comments and encouragement.

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Amidst the mostly opportunistic uses of federalism-based arguments, it is no easy task for regulators to develop a more careful understanding of the possible architectures for regulatory federalism. During the long reign of the Communications Act of 1934,[1] regulators operated under a dual federalism model that rested on a jurisdictional divide between interstate and intrastate communications. Under the Telecommunications Act of 1996 (Telecom Act or 1996 Act),[2] however, regulators must conceptualize and implement a cooperative federalism strategy that relies not on a division between, but on a sharing of, federal and state authority. Both the prevalence of opportunistic arguments related to federalism issues and the familiarity with the old dual federalism model have made it difficult for industry participants to appreciate–let alone explain–the more nuanced and effective approaches that can result from a cooperative federalism regulatory strategy.[3]

This essay explains the nature of the Act's cooperative federalism strategy and how it can help the FCC and the state agencies devise solutions to nettlesome regulatory problems. In particular, it discusses how this strategy relates to the enforcement of interconnection agreements that govern relations between incumbent providers and new entrants into the local telephone market, the ongoing debates over intercarrier compensation reform, and the proper policy for the unbundling of the incumbent providers' local telephone networks. In conclusion, it highlights how federal and state regulators have yet to fully appreciate and accept the cooperative federalism framework, thereby contributing to the continuing legal uncertainty surrounding the Telecom Act's implementation.

I. THE BASICS OF COOPERATIVE FEDERALISM

Although relatively new to the telecommunications industry, cooperative federalism is a familiar feature in other regulatory regimes, including the Medicaid Act and most environmental programs.[4] Put simply, cooperative federalism involves the sharing of authority between federal and state

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1. Ch. 652, 48 Stat. 1064 (codified at 47 U.S.C. § 157 *et seq.*).

2. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15, 18, and 47 U.S.C.).

3. For an example of one broad-brush view that rejects a role for states in implementing the Act, see Peter Huber, *Forget Federalism: Deregulate the Phones*, NATIONAL REVIEW ONLINE (Feb. 18, 2003), *at* http://www.nationalreview.com/comment/comment-huber021803.asp ("The federalists lost the fight for a 'more granular' approach to telecom regulation in 1996. They shouldn't want to win it now.").

4. For a review of a number of cooperative federalism programs, see U.S. GENERAL ACCOUNTING OFFICE, REGULATORY PROGRAMS, BALANCING FEDERAL AND STATE RESPONSIBILITIES FOR STANDARD SETTING AND IMPLEMENTATION 8 (Mar. 2002).

agencies, often leaving state agencies with discretion to implement broad federal policy goals, binding criteria, or guidelines. In the telecommunications area, the pole attachment amendments of 1978[5] provided an early illustrative model of how cooperative federalism can work.[6]

A critical advantage of a cooperative federalism approach is that it sets forth a basic federal framework while allowing states to experiment within certain contours. In short, the benefits of cooperative federalism as a framework for "democratic experimentalism"[7] fall into four basic categories: (1) respecting long-standing state interests and autonomy; (2) facilitating local participation and greater accountability for public policies; (3) allowing for local experimentation and interstate competition; and (4) relying on the economy of local agencies (rather than creating or expanding a national bureaucracy).[8] Particularly for situations where there are a number of alternative plausible solutions, relying on state agencies can offer an alternative to the risk of adopting a national approach that steers the wrong course.

For the FCC to utilize the Telecom Act's cooperative federalism strategy most effectively, it must first conceptualize what circumstances would justify a unitary policy. For both federal and state regulators, it is often tempting to assert one's own jurisdiction regardless of whether the benefits of uniformity or diversity actually counsel for a unitary or flexible approach. To the extent that the FCC can cabin its own claim to set uniform and state-displacing rules, it can ensure that it facilitates the benefits of cooperative federalism. In particular, the FCC should only insist on uniformity where there are substantial and clear efficiencies from eliminating diverse approaches, where a single approach is clearly optimal over others, or where there is a clear showing that the costs of diversity outweigh the benefits of state experimentation and implementation.

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5. Communications Act Amendments of 1978 § 6, 92 Stat. 35 (codified at 47 U.S.C. § 224).

6. *See* 47 U.S.C. § 224(f) (2000) (requiring utilities to provide "nondiscriminatory access to any pole, duct, conduit, or right-of-way"). Under this regime, states may choose to use the specific rates suggested by the FCC to simplify life for interstate companies, but are not required to do so. *See, e.g.*, MCI Telecomms. Corp. v. New York Tel. Co., 134 F. Supp. 2d 490, 503-04 (N.D.N.Y. 2001).

7. *See* Michael C. Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60-73 (1998); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

8. For a further discussion of these points, see Philip J. Weiser, Chevron, *Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 31 (1999) [hereinafter Weiser, *Chevron*].

To date, the FCC has not conceptualized the Act's cooperative federalism strategy in a clear framework. Like many federal agencies and institutions, the FCC often invokes the importance of national rules and uniformity as an "incantation" rather than as a conclusion that flows from reasoned analysis. If the FCC did develop an analytical framework for evaluating the costs and benefits of uniformity in federal rules, it would take an important step toward setting the terms of the regulatory federalism debate and would limit the opportunistic use of federalism arguments. Ideally, this framework would focus on the agency's confidence in the merits of a single national approach, the costs resulting from the use of different institutions, and the institutional competence of the state (as opposed to federal) agencies' ability to handle the relevant task.

II. THE REGULATION OF INTERCONNECTION AGREEMENTS

For courts and regulators who were steeped in the dual jurisdictional framework of the 1934 Act, the 1996 Act's cooperative federalism architecture presents a set of challenges. As an initial matter, courts and regulators have often balked at the idea that the Act combines federal and state authority in creative ways, particularly its call for state agencies to interpret and implement federal law in the formation of interconnection agreements.[9] As the Supreme Court made clear in *AT&T Corp. v. Iowa Utilities Board*,[10] however, the Telecom Act took the novel course of relying on state agencies to implement federal law.[11] Even though the FCC has, at times, struggled to appreciate this new regime, it has recognized that the Act's regulatory architecture enables different states to experiment with approaches that are

9. *See* Weiser, *Chevron*, *supra* note 8, at 46 & n.171.

10. 525 U.S. 366 (1999).

11. Justice Scalia's description of the Act bears repeating:

> [b]roadly extended [federal] law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which—within the broad range of lawful policymaking left open to administrative agencies—are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 385 n.10 (1999).

consistent with the statutory text and purpose unless and until it decides that a single national standard is appropriate.[12]

Under the Telecom Act's cooperative federalism strategy, the flexibility and authority that the FCC possesses in making telecommunications policy also inheres in state agencies who act under the oversight of the FCC. To date, however, the federal courts have failed to appreciate this feature of the Act's cooperative federalism design and two key corollaries that follow from it. First, when state agencies act in a gap-filling role to address issues left open by the statutory scheme and the FCC's regulations, they deserve the same deference accorded to the FCC.[13] Second, when the state agencies enforce the terms of interconnection agreements, they are enforcing a federal regime and thus exercise the same authority that the FCC has under that regime to design and enforce appropriate remedies.[14]

Given its novelty, it should not be a surprise that the FCC and the courts have only begun to embrace the implications of the Telecom Act's cooperative federalism regulatory architecture. In a significant move in that direction, the FCC did make clear that the Act contemplates that state agencies possess the authority not merely to arbitrate interconnection agreements, but to enforce them as well.[15] Similarly, the Supreme Court's decision in *Wisconsin Department of Health and Family Services v. Blumer*,[16] albeit arising in the Medicaid Act context (and dealing with the rules governing spousal impoverishment provisions), sends a clear message to the lower courts to respect state discretion in implementing cooperative federalism regulatory programs. To be sure, *Blumer* did not state specifically that federal courts should accord *Chevron*[17] deference to state agencies, but it emphasized the

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12. In deciding what elements of the network should be unbundled, the FCC took just this approach, first allowing states to decide on their own whether to mandate subloop unbundling, but later adopting regulations requiring that this element of the incumbent's network be unbundled and made available in all states. *See* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and The Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1740-41 (2001) [hereinafter Weiser, *Federal Common Law*].

13. *See* Weiser, *Chevron*, *supra* note 8, at 30.

14. *See* Weiser, *Federal Common Law*, *supra* note 12, at 1752-66.

15. *See* Starpower Communications, *L.L.C.*, 15 F.C.C.R. 11277, 11279 (June 14, 2000) (concluding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252").

16. 534 U.S. 473 (2002).

17. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

importance of state agency discretion in implementing cooperative federalism programs.[18]

Whether state agency-made rules governing violations of the Telecom Act are federal or state law in nature continues to perplex regulators, courts, and commentators. This issue is particularly challenging because there are two forms of cooperative federalism programs: ones where state agencies develop federal rules and ones where state rules fill in a federal regime.[19] In many cases, the distinction between these two regulatory architectures is not significant. But when contemplating the scope of available remedies for violations of interconnection agreements, the difference called for by the two approaches can be quite significant, particularly where the authority under the federal regime might well be more open-ended than the constrained state-law

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18. Justice Ginsburg's discussion of the issue bears notice:

> We therefore do not definitively resolve that matter, although we note that the leeway for state choices urged by both Wisconsin and the United States is characteristic of Medicaid. The Medicaid statute, in which the MCCA is implanted, is designed to advance cooperative federalism. *See* Harris v. McRae, 448 U.S. 297, 308 (1980). When interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims. . . . In a recently proposed rule, the Secretary declared that 'in the spirit of Federalism,' the Federal Government 'should leave to States the decision as to which alternative [income-first or resources-first] to use.' 66 Fed. Reg. 46763, 46767 (2001). . . . We perceive nothing in the Act contradicting the Secretary's conclusion that [divesting the states of discretion in this area] is unnecessary and unwarranted.

Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473, 495-98 (2002).

19. *See* Weiser, *Federal Common Law*, *supra* note 13, at 1696-98 (discussing the issue). Indeed, the interplay between federal and state law can get quite complicated. As the Fourth Circuit viewed it, for example, the Surface Mining Control Act employed a cooperative federalism strategy under which "after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations [that set forth the basic policy goals], while continuing to provide the 'blueprint' against which to evaluate the State's program, 'drop out' as operative provisions." Bragg v. W. Va. Coal Ass'n, 248 F.3d 275, 289 (4th Cir. 2001). By contrast, as explained in *Arkansas v. Oklahoma*, the Clean Water Act's regulations "effectively incorporate" state law into the federal regulatory regime, making state law, in certain circumstances, federal law. 503 U.S. 91, 110 (1992).

authority.[20] At bottom, however, the appropriate role for and conception of state agencies within cooperative federalism regimes should turn on whether they are entrusted by both Congress and the federal agency with a delegation [of] "general authority to make rules with force of law."[21]

Under current law, the ability of state agencies to rely on federal authority to enforce interconnection agreements remains somewhat uncertain. As I have explained elsewhere, I believe the state agencies are authorized by the Act–unless limited by FCC rules–to develop federal regulations to enforce the violations of interconnection agreements.[22] To date, most courts have balked at this conception of cooperative federalism, generally viewing interconnection agreements as creatures of state law.[23] Presumably, unless and until either Congress or the FCC provide clearer guidance on the Act's enforcement regime, courts will continue to resist any claims that state agencies are, in effect, authorized to make federal common law in the process

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20. For a discussion of this point, see Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 674-693 (2001) [hereinafter Weiser, *Towards a Constitutional Architecture*] (arguing that, in absence of state statute declining jurisdiction, federal grant of jurisdiction enables a public utility commission to act). To date, courts have differed on whether a grant of federal authority can enable a state court (or agency) to act in the absence of express state enabling authority, though the majority view is that such grants of authority can confer jurisdiction. *Compare* Kaplan v. Democrat & Chronicle, 698 N.Y.S.2d 799, 800 (App. Div. 1999) (state court has jurisdiction to implement federal regime in the absence of state statute declining jurisdiction) *with* R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc., 815 A.2d 816, 817, 827 (Md. Ct. Spec. App. 2003) (based on action prior to the federal statute, a state court lacks authority to implement a federal statute without later state conferral of jurisdiction).

21. *See* United States v. Mead Corp., 533 U.S. 218, 237 (2001).

22. *See* Weiser, *Federal Common Law*, *supra* note 12, at 1752-1766.

23. *See* Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc., 323 F.3d 348, 355 (6th Cir. 2003) (applying state law and noting that "[s]everal federal courts have held that a state commission's contractual interpretation of an interconnection agreement is governed by state, not federal, law."); *see also* BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc., 278 F.3d 1223, 1244 (11th Cir. 2002) (Barkett, J., dissenting) (arguing that the entire Act's enforcement regime is a matter of state law). Nonetheless, a number of courts have recognized that interconnection agreements are special forms of contracts that may embody remedy provisions outside those associated with normal contracts. *See, e.g.*, Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n, 2003 WL 1903363, *6 (S.D. Ind. Mar. 11, 2003) (noting that performance assurance provisions serve to "'encourage compliance with [interconnection] agreements by setting forth clear remedies where [an incumbent] fails to comply' with their interconnection agreements,") (quoting US West Communications, Inc. v. Hix, 57 F. Supp. 2d 1112, 1121-22 (D. Colo. 1999)); *see also Ind. Bell Tel. Co.*, 2003 WL 1903363 at *9 (concluding that state agency has authority under the Telecom Act to develop special remedy provisions).

of enforcing interconnection agreements.[24] In a welcome move, however, the FCC recently clarified that its role in enforcing interconnection agreements is as an alternate forum to state agencies and that it is the role of the federal district courts–and not the FCC–to review the enforcement decisions of the state agencies.[25]

III. INTERCARRIER COMPENSATION REFORM

A major challenge on the FCC's agenda is to reform the existing regime of intercarrier compensation, which governs how much carriers pay each other when they hand off traffic to one another. In principle, the FCC intends to reform this regime to facilitate convergence between different types of services–local, wireless, Internet, etc.–so that the regulatory treatment of different technologies does not give any particular one an artificial advantage in the marketplace (i.e., provide for different payments based on the particular technology or use of the network). The FCC's early efforts to reform reciprocal compensation arrangements between local providers, which focused on regulating the pricing of calls to Internet Service Providers, ignored the fact that the 1996 Act displaced the old dual jurisdictional model. In particular, the FCC initially failed to appreciate that it did not need to establish the interstate nature of telephone calls to Internet Service Providers in order to justify the promulgation of rules concerning reciprocal compensation for these calls.[26] As the D.C. Circuit later explained, the FCC's authority under the

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24. *See, e.g.*, Verizon Md. Inc. v. RCN Telecom Servs., Inc., 248 F. Supp. 2d 468, 478 (D. Md. 2003) ("The 1996 Act evinces no congressional intent that federal courts—much less state administrative agencies—craft a federal common law of contract interpretation to construe the provisions of interconnection agreements."). Congressional clarification of this point seems unlikely, as a provision of the Senate version of the Telecommunications Act specified a federal measure of damage remedy for interconnection agreement violations ($1 million per day fine), but it was removed entirely from the legislation and the issue was left unaddressed. *See* Telecommunications Competition and Deregulation Act of 1995, S. 652, 104th Cong., *available by search at* http://thomas.loc.gov/home/c108query.html.

25. *See* CoreComm Communications, Inc. v. SBC Communications Inc., 18 F.C.C.R. 7568, 7573-76 ¶¶ 13-19 (Apr. 17, 2003); *see also Mich. Bell Tel. Co.*, 323 F.3d at 361 (Moore, J., concurring) (explaining importance of judicial review of state agency decisions). To put in perspective the length of time it can take to flesh out the details of an enforcement regime, the Supreme Court is just now set to consider whether a state agency action regarding pollution control decisions can be second-guessed by the EPA. *See* Alaska v. United States Envtl. Prot. Agency, 298 F.3d 814, 820 (9th Cir. 2002), *cert. granted*, __U.S.__, 123 S.Ct. 1253 (2003).

26. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 14 F.C.C.R. 3689, 3690 ¶ 1 (Feb. 26, 1999).

1996 Act to define the appropriate reciprocal compensation regime, and not its jurisdiction over interstate calls, governs the resolution of this issue.[27]

Even with the benefit of the D.C. Circuit's guidance, the FCC's subsequent action on remand still failed to adhere to a cooperative federalism model, instead assuming sole jurisdiction on the question and calling for a single national approach.[28] In so doing, the FCC again failed to focus on the Act's provision that governed reciprocal compensation (Section 251). Unfortunately, the FCC's approach not only failed to implement the appropriate statutory provision, but also missed the opportunity to enlist the states as partners in addressing this issue.[29] To be fair to the FCC, its avoidance of the section 251 cooperative federalism architecture might have reflected its concern that the section 251 reciprocal compensation regime overly restricted its discretion, but even this fear appears unwarranted in light of the D.C. Circuit's treatment of the issue.[30]

In the wake of a second remand from the D.C. Circuit,[31] the FCC is undertaking an ambitious effort to reform all intercarrier compensation arrangements. The Commission's Notice of Proposed Rulemaking, unlike its past actions, reflects a clear awareness of the opportunity to enlist the states as partners in this enterprise.[32] This awareness, however, only begs the more difficult question of what alternative conceptions of regulatory federalism could make effective use of the state agencies in this reform effort. With respect to reforming intercarrier compensation arrangements, I will discuss five ways of defining a national goal for a unified regime and relying on the states to help implement it.

First, the FCC could set a basic approach and leave state agencies with the flexibility to get to that goal by a certain period of time. In the intercarrier compensation area, the two basic policies that the FCC might adopt are either one that imposes a "calling party pays approach" (which raises the question of how much should be paid for transport and termination) or a "bill and keep"

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27. *See* Bell Atl. Tel. Cos. v. FCC, 206 F.3d 1, 6 (D.C. Cir. 2000).

28. The FCC later recognized that its action was in tension with the spirit, if not the letter, of the D.C. Circuit's decision. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 16 F.C.C.R. 9151, 9165 n.56 (Apr. 27, 2001).

29. Commissioner Furchtgott-Roth recognized this point in dissent. *See id.* at 9214 (noting how FCC's approach did not demonstrate "a modicum of respect for States").

30. *See* WorldCom, Inc. v. FCC, 288 F.3d 429, 434 (D.C. Cir. 2002) (explaining that "there is plainly a non-trivial likelihood that the Commission has authority to . . . [require its preferred policy] (perhaps under §§ 251(b)(5) and 252(d)(B)(i))").

31. *See id.* (remanding Order on the ground that the Commission made essentially the same mistake as addressed in Bell Atl. Tel. Co. v. FCC, 206 F.3d 1, 6 (D.C. Cir. 2000)).

32. *See* Developing a Unified Intercarrier Compensation Regime, 16 F.C.C.R. 9610, 9654 ¶ 122 (Apr. 27, 2001).

arrangement (which raises the question of where the "hand-off" of a call takes place). By allowing the state agencies some flexibility in implementing its chosen policy, the FCC would afford them the same type of flexibility allowed in the environmental area, where state agencies are often given some leeway to devise the best strategy for achieving certain levels of emissions. In allowing state agencies some discretion in migrating away from the provision of reciprocal compensation payments made for calls made to Internet Service Providers, the FCC has already adopted a version of this strategy. Moreover, such an approach might enable state regulators to implement intrastate access charge reform along with the reform of other intercarrier compensation systems.

Second, the FCC could mandate a particular policy and allow flexibility within methods of enforcement. Take, for example, a scenario where the FCC decides to mandate a bill and keep regime for all traffic exchanged between networks. This regime might well rely on certain balanced traffic requirements–e.g., to preclude free riding (just serving telemarketers)–that could be policed by the states.

Third, the FCC could adopt a general policy but leave open for flexibility certain details of that policy. In the intercarrier compensation area, one such important detail might be defining where transport must be provided to–e.g., the point of physical interconnection or to the carrier's central office. The FCC could, as an initial matter at least, leave that choice up to the state agencies and only later decide whether to mandate a particular approach.

Fourth, the FCC could mandate one or more sets of permissible approaches, but leave open the door for it to waive this mandate if a state proposed an alternative approach that it deemed acceptable. In the Medicaid Act and welfare context, for example, cooperative federalism programs often rely on this strategy, presuming that the federal agency might not have evaluated all appropriate approaches at the outset.[33] This approach goes hand-in-hand with the classic cooperative federalism tool of requiring a state agency to report back to the federal agency on its approach so that the federal agency can certify it as permissible. Insofar as this model leaves open the door to multiple strategies, it is important that the federal agency, or an organization of state agencies, publicize "model rules" emerging from the experience of the states. This practice enables good ideas to spread and bad experiments to be avoided.

Finally, the FCC could set up a regime of conditional participation that would delegate federal authority to individual states on the condition that they

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33. For a discussion of the use of waivers in the Medicaid context, see Judith M. Rosenberg & David T. Zaring, *Managing Medicaid Waivers: Section 1115 and State Health Care Reform*, 32 HARV. J. ON LEGIS. 545 (1995).

took certain actions. Under this approach, the opportunity to implement the federal regime for a particular state would be allowed only if that state's regulations were also aligned to meet the federal regime's basic policy goals. Alternatively, the FCC could condition the receipt of universal service funding upon state compliance with federal directives. In implementing either of these two approaches, however, the federal agency should be careful to leave a state with discretion not to follow this model of regulation at all, lest it veer away from a cooperative federalism strategy to a coercive one.[34]

IV. UNBUNDLING POLICY

In the first chapter of developing the rules for unbundling the incumbents' local telephone network, the FCC set forth an ambitious set of local competition rules.[35] On the whole, the FCC's vision for the Telecom Act failed to appreciate the important role played by state agencies and in word, if not in deed, suggested that the states should not be given much discretion to implement the Act. Given the high stakes involved the Act's implementation and the continuing confusion as to whether the Act replaced the old dual jurisdictional framework with a cooperative federalism one, it is quite possible that any approach to the role of the states would have spurred a contentious round of litigation. But because the FCC's philosophy on the appropriate approach to unbundling and regulating the prices of wholesale access to the local network purported to leave a marginal role for the states, the litigation following the FCC's Local Competition Order[36] often featured diametrically opposed views about the regime put in place by the Act.

The judicial decisions in the wake of the Act's implementation underscored two key elements of cooperative federalism. First, the Supreme Court's ruling in the *Iowa Utilities* case explained that the implementation of the Telecom Act fell within the scope of the FCC's purview and that the FCC enjoyed residual authority to define its terms as it saw fit.[37] Second, as to the FCC's use of that authority, the courts have explained that a failure to use state agencies to implement the Act in apparently sensible ways needs to be explained. Take, for example, the FCC's decision not to allow the state agencies any discretion to reduce–based on local circumstances–the list of the

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34. The importance of this option is a key aspect of developing a constitutional framework for cooperative federalism. *See* Weiser, *Towards a Constitutional Architecture*, *supra* note 20, at 693-707.

35. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (Aug. 8, 1996).

36. 11 F.C.C.R. 15499 (Aug. 8, 1996).

37. *See* AT&T Corp. v. Util. Bd., 525 U.S. 366, 378 (1999).

elements that must be unbundled from the incumbents' network and made available to new entrants. In so ruling, the FCC cited the concern that so doing would frustrate the business plans of the new entrants.[38] On review, however, the D.C. Circuit criticized this regulation, explaining that the FCC's rationales for an "undifferentiated national rule" did not hold up upon close examination.[39]

In its Triennial Review decision,[40] the FCC attempted to address the D.C. Circuit's analysis and to develop a new regime for local competition that learned from the lessons of the seven years since the Act's passage. Unfortunately, in its perplexing decision, the FCC failed to provide a coherent view of regulatory federalism. In short, the decision failed to offer any self-conscious vision about when national policy requires a single approach and when state agencies can be relied on to implement the Act's call to unbundle elements of the incumbent providers' network. On one set of issues, involving the "line sharing" requirement, the FCC left the states with no opportunity to mandate this policy (which had been initiated at the state level before being mandated nationwide), but for another critical issue, involving "unbundled switching," the FCC left the states with enormous discretion. By failing to adopt a principled vision of regulatory federalism, the FCC only encouraged more selective uses of regulatory federalism arguments and left its decision vulnerable to a legal challenge.

CONCLUSION

The role of the state agencies in implementing the Telecommunication Act of 1996 should be a constructive partnership with the FCC in advancing the Act's goals. Through a number of different approaches ranging from allowing waiver requests to diversity in implementation, a cooperative federalism strategy can enable state agencies to exercise discretion where there is no clearly optimal uniform strategy. Unfortunately, as evidenced by the FCC's Triennial Review decision, the FCC has yet to fully embrace such a partnership with the state agencies, instead invoking the virtues of state discretion only selectively and inconsistently, thereby adding to the continuing legal uncertainty and confusion about how the Act operates.

Over time, both federal and state regulators may well come to appreciate the benefits of the Act's cooperative federalism architecture. Unlike the

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38. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 F.C.C.R. 3696, 3767 ¶ 154 (Nov. 5, 1999).

39. United States Telecom Ass'n. v. FCC, 290 F.3d 415, 422-26 (D.C. Cir. 2002).

40. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 F.C.C.R. 16978 (Aug. 21, 2003).

environmental and Medicaid Act policy worlds, where state regulators only used a cooperative federalism strategy, telecommunications regulators grew up under a dual jurisdiction model. Thus, for many regulators, the transition to a cooperative federalism approach creates a form of culture shock and will take time to set in. The quicker this transition proceeds, however, the more effectively regulators will be able to deal with difficult questions such as enforcing interconnection agreements, reforming intercarrier compensation arrangements, and developing unbundling policy.