SECTION 332 OF THE COMMUNICATIONS ACT: A FEDERALIST APPROACH TO REGULATING WIRELESS TELECOMMUNICATIONS SERVICES

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If the States are united under one government, there will be but one national civil list to support; if they are divided into several confederacies, there will be as many different national civil lists to be provided for—and each of them, as to the principal departments, coextensive with that which would be necessary for a government of the whole. The entire separation of the States into thirteen unconnected sovereignties is a project too extravagant and too replete with danger to have many advocates.1

—Alexander Hamilton, The Federalist No. 13

The principle issue in Alexander Hamilton’s Federalist No. 13 was economy in government: Hamilton argued that one central federal government was superior to separate state governments in order to preserve the economies of governmental administration.2 Hamilton advocated a system of “dual federalism,” in which certain enumerated powers would be given to the federal government while other powers would remain with the states.3 Enough of his contemporaries clearly agreed with Hamiltonian concepts of federalism to incorporate them into the United States Constitution.4

More than two hundred years later, federalist principles continue to define our government. Federalism is more relevant to the nature of our country today than ever before, as we enjoy far greater mobility and interstate bonds than our Founding Fathers could possibly have foreseen. Today, federalism reveals itself when the federal government preempts or allocates state power on a wide array of issues.5 Federalist tenets are particularly evident in the law governing telecommunications services, as the dual interstate/intrastate nature of telecommunications services clearly reflects a “federalist” regulatory regime.6

Consistent with these principles, Congress enacted legislation affecting the telecommunications market with an eye toward creating a “federalist” telecommunications infrastructure that provides for the rapid national deployment of new services.7 In doing so, Congress implicitly recognized that the introduction of telecommunica-

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1 The Federalist No. 13 (Alexander Hamilton).
2 See id.
3 See id.
4 See id.
6 See, e.g., Louisiana Pub. Serv. Comm’n v. FCC, 476 U.S. 355, 360 (1986). The Act establishes, among other things, a system of dual state and federal regulation over telephone service, and it is the nature of that division of authority that these cases are about. In broad terms, the Act grants to the FCC the authority to regulate ‘interstate and foreign commerce in wire and radio communication,’ while expressly denying that agency ‘jurisdiction with respect to . . . intrastate communication service . . .’. However, while the Act would seem to divide the world of domestic telephone service neatly into two hemispheres—one comprised of interstate service, over which the FCC would have plenary authority, and the other made up of intrastate service, over which the States would retain exclusive jurisdiction—in practice, the realities of technology and economics belie such a clean parceling of responsibility. This is so because virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service, and is thus conceivably within the jurisdiction of both state and federal authorities. Moreover, because the same carriers provide both interstate and intrastate service, actions taken by federal and state regulators within their respective domains necessarily affect the general financial health of those carriers, and hence their ability to provide service, in the other ‘hemisphere.’
7 See, e.g., Preamble to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 71 (an act “[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of . . .”

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tions services could be significantly delayed if it required the approval of both the federal government and all fifty states.\(^8\) In Hamilton's words, seeking such approvals would be "a project too extravagant and too replete with danger to have many advocates."\(^9\)

In 1993, Congress enacted legislation that severely restricted state regulation of rates and entry for certain qualified mobile telephone services, thereby "federalizing" much of the regulation of wireless telecommunications services.\(^10\) Section 6002 of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") amended section 332 of the Communications Act of 1934 ("Communications Act" or "the Act")\(^11\) to provide a revised regulatory scheme for mobile wireless services. Importantly, revised section 332 granted the Federal Communications Commission ("FCC" or the "Commission") authority to preempt state regulation of entry into the wireless market and state regulation of rates charged by wireless service providers, while preserving to the states the power to regulate the "other terms and conditions" of wireless service.\(^12\)

This comment will analyze the preemption provision of section 332 and the legislative considerations that went into its enactment. Further, it will examine how the FCC has interpreted the preemption provisions of section 332 through its implementing orders and other proceedings. This comment will also explore the various ways in which telecommunications carriers have attempted to invoke the preemption provision of section 332 to avoid state regulation and the judicial response to such claims. It will analyze relevant court decisions and examine the strengths and weaknesses of various rationales. This comment concludes that the FCC has with notable exceptions interpreted section 332 in accordance with the language of the statute and congressional intent, while the courts have added little to defining the scope of section 332 because of their reluctance to thoroughly probe the provision's limits. Finally, this comment predicts that future litigation will compel the courts to more fully assess section 332's preemptive reach to provide litigants with practical boundaries for bringing suit.

I. THE LANGUAGE AND POLICIES OF SECTION 332

Section 332(c)(3)(A), the preemption provision of section 332, reads,

> Notwithstanding sections 152(b) and 221(b), no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.\(^13\)

Enactment of revised section 332 was guided by two overriding principles—a belief that like services should be regulated in the same manner\(^14\) and a recognition that regulation of mobile services is most appropriate in a federal forum because mobile services "by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."\(^15\) To ensure federal jurisdiction over com-
merical mobile radio rate and entry regulation, section 332 clearly preempts states in that area.\footnote{H.R. Rep. No. 103-213, at 1095 (1993).}

Although section 332 creates a presumption of federal jurisdiction over rates and entry, Congress established criteria in section 332(c)(3)(B) by which states could petition the FCC for authority to continue regulating rates for commercial mobile services.\footnote{H.R. Rep. No. 103-111, at 549 (1993).} However, Congress tasked the FCC with ensuring that any state’s exercise of authority does not undermine the statutory goal of providing similar services similar regulatory treatment.

In amending section 332 of the Act, Congress intended “to establish a Federal regulatory framework to govern the offering of all mobile services.”\footnote{See id.} Congress revised section 332 because it found that the regulatory structure governing mobile services subjected “common carrier” services to state as well as federal rules while permitting “private” mobile services to escape regulation. Congress revised section 332 to ensure that it did not “impede the continued growth and development of commercial mobile services and deny consumers the protections they need[.]”\footnote{See id.} Congress recognized that the implementation of the original section 332 had created an unbalanced marketplace in which certain private mobile radio licensees, but not their cellular competitors, were exempt from the obligations of Title II of the Communications Act and from state regulation.\footnote{See id. (contrasting common carrier regulation, including Title II requirements “that rates must be just and reasonable and not unreasonable discriminatory” and state regulation of rates and services, with private carriers, who “are statutorily exempt from [Title II]”).} Also, the imbalance forced commercially operated mobile licensees to compete against private carriers that faced essentially no regulation at the Federal or state level.\footnote{Id. at 549.}

With the passage of revised section 332, Congress clearly sought to achieve “regulatory parity” among services that were “substantially similar.” Congress noted that “[f]unctionally, these ‘private’ carriers have become indistinguishable from common carriers but private land mobile carriers and common carriers are subject to inconsistent regulatory schemes.”\footnote{Id. at 549.} Furthermore, Congress noted that “the disparities in the current regulatory scheme could impede the continued growth of development of commercial mobile services and deny consumers the protections they need if new services such as PCS were classified as private.”\footnote{See id. To achieve its goal of regulatory equality, Congress ordered the classification of wireless providers into one of two categories: Commercial Mobile Radio Service (“CMRS”) 2\footnote{See 47 U.S.C. § 332(d)(1) (1994 & Supp. IV 1998).} or Private Mobile Radio Service (“PMRS”). 26 CMRS providers were to be considered common carriers and would therefore be subject to Title II of the Communications Act.\footnote{27 As common carriers, CMRS providers are any that are not commercial mobile services or the “functional equivalent” of a commercial mobile service. See 47 U.S.C. § 532(d)(5) (1994 & Supp. IV 1998). See 47 U.S.C. § 332(c) (1994 & Supp. IV 1998). The Act requires common carriers to provide service upon reasonable request, and prohibits them from charging unjust or unreasonable rates or from engaging in unjustly discriminatory practices. See 47 U.S.C. § 201 (1994). The Act imposes a number of other requirements upon common carriers. For example, carriers are required to file schedules of their rates and charges (i.e., tariffs). See 47 U.S.C. § 203 (1994). Carriers}}

\footnote{See 47 U.S.C. § 332(c)(3)(A) (1994); see also U.S. Const. art VI., cl. 2. The Supremacy Clause of Article VI mandates that federal law may supersede state laws and pre- empt state authority when Congress exercises a granted power. See id.}

carriers were made subject to petitions to deny and statutory public notice requirements.\textsuperscript{26} Although other common carriers are subject to state regulation of rates and entry into the market, section 332(c)(3)(A) provided that states were preempted from regulating CMRS rates and entry to foster the growth and development of CMRS services on a nationwide level.\textsuperscript{27} Congress intended to completely preempt the states in terms of regulating the rates and entry of CMRS services unless states could demonstrate to the FCC's satisfaction that they fulfilled the qualifications Congress set forth in section 332(c)(3)(B);\textsuperscript{30} meeting these standards allowed the state to continue regulating rates and entry.\textsuperscript{31}

II. THE FCC'S IMPLEMENTATION OF SECTION 332.

are required to file with the FCC their contracts and agreements with other carriers. See 47 U.S.C. § 211 (1994). There are restrictions upon the ability of individuals to serve as officers or directors of more than one carrier, and FCC approval for such interlocking directorates is required. See 47 U.S.C. § 213 (1994). Carriers must seek FCC approval before commencing or discontinuing service. See 47 U.S.C. § 214 (1994). The Budget Act gave the FCC authority to forbear from enforcing certain provision of Title II, and the FCC did adopt forbearance rules so that CMRS providers are not required to (1) file tariffs for interstate service to their customers, or for interstate access service; (2) file copies of intercarrier contracts; (3) seek authority for interlocking directors; or (4) submit section 214 applications for new facilities or discontinuance of existing facilities. 47 C.F.R. § 20.15(b) (1998).

\textsuperscript{26} See 47 U.S.C. § 309(d) (1994 & Supp. IV 1998). Under section 309(d) of the Communications Act, common carrier applications must be placed on public notice for 30 days prior to grant, to allow for petitions to deny to be filed. See id.


\textsuperscript{31} The FCC released notices of proposed rulemaking and orders regarding the implementation of section 332 that, unlike those referenced herein, are not explored in detail in this comment because they do not bear on the issues presented in this comment. See, e.g., \textit{In re Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, Second Further Notice of Proposed Rulemaking, 9 FCC Rcd. 4400} (1994); \textit{Fourth Report and Order, 9 FCC Rcd. 7123} (1994); \textit{Third Further Notice of Proposed Rulemaking, 10 FCC Rcd. 6880} (1995); and \textit{Memorandum Opinion and Order on Partial Reconsideration of Second Report and Order, 11 FCC Rcd. 19729} (1996).

\textsuperscript{33} See \textit{In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Notice of Proposed Rulemaking, 8 FCC Rcd. 7988} (1995) [hereinafter, \textit{Mobile Services NPRM}].

\textsuperscript{34} See \textit{Mobile Services NPRM, 8 FCC Rcd. at 7989, para. 7. The Mobile Services NPRM states,}

As revised by the Budget Act, section 332 of the Communications Act, governs the regulation of all “mobile services” as defined in section 3(n) of the Act. The statute divides all mobile services into two categories, “commercial mobile service” and “private mobile service,” both of which are defined in section 332(d), and confers on the Commission to further specify these terms by regulation. We request comment on how these terms should be interpreted and, where appropriate, further specified in our regulations.

\textit{Id.}\textsuperscript{35} \textit{See Mobile Services NPRM, 8 FCC Rcd. at 7994, para. 34. It states,}

The Budget Act requires us to examine the regulatory status of all existing mobile services under the statutory definitions discussed above. We therefore seek comment on which existing mobile services will become commercial mobile services and which will become private mobile services under section 332(d). In particular, we seek comment on the degree to which the new definitions require existing private services to be reclassified as commercial mobile services and on whether existing common carriers may be reclassified as private.

\textit{Id.}\textsuperscript{36} PCS is defined in the Commission's rules as “[r]adio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks.” 47 C.F.R. § 24.5 (1998). There are two types of PCS service: narrowband and broadband. \textit{See id.} Narrowband PCS service is expected to be used to provide services as voice message paging, two-way acknowledgement paging, and other text-based services. See Wireless Telecommunications Bureau, Narrowband PCS Fact Sheet (visited Jan. 3, 2000) <www.fcc.gov/wtb/pcs/nbfcsht.html>. The narrowband PCS spectrum is located in the 901–902, 930–931, and 940–941 MHz bands. See 47 C.F.R. § 24.129. Broadband PCS will likely be used in the development of advanced wireless phones, and to provide a variety of mobile services including multi-function portable phones, portable facsimile and other imaging devices, new types of multi-function cordless phones, and advanced devices with two-way data capabilities. See Wireless Telecommunications Bureau, Broadband PCS Fact Sheet

A. The FCC's Implementing Orders\textsuperscript{32}

On October 8, 1993, the FCC released a \textit{Notice of Proposed Rulemaking ("NPRM")} to implement the regulatory parity requirements of the Omnibus Budget Reconciliation Act of 1993.\textsuperscript{33} The NPRM was structured to address five basic issues. First, it sought public comment on the criteria for drawing the boundaries between private and commercial mobile radio services.\textsuperscript{34} Second, it addressed the regulatory classification of existing services to attempt to apply the criteria to current licensees and the services they provided.\textsuperscript{35} Third, the NPRM sought comment on the regulatory classification of Personal Communications Services ("PCS")\textsuperscript{36} and proposed a system allowing PCS licensees to "self-designate" their regulatory status.
as either private, commercial or both. 37 Fourth, it questioned the application of Title II to CMRS services and examined the extent to which the Commission should forbear from imposing common carrier obligations on CMRS providers. 38 Finally, the NPRM addressed other issues associated with interconnection rights, foreign ownership limitations and state petitions to extend rate regulation authority. 39

The FCC’s First Report and Order 40 in the section 332 proceeding was released January 4, 1994, only three months after the First NPRM. It addressed only one issue—foreign ownership—and did not discuss the larger issues of the proceeding, such as interpreting the statutory definitions of CMRS and PMRS or defining the scope of federal pre-emption under section 332. 41 Although CMRS services are subject to foreign ownership restrictions pursuant to section 310(b) of the Act, 42 the First Report and Order established procedures whereby PMRS services that had been reclassified to CMRS could request a waiver and retain existing foreign ownership. 43 The PMRS-to-CMRS licensees “grandfathered” by this waiver procedure would be permitted to retain their existing foreign interests, 44 but any subsequent transfers or assignments would have to be made to domestic persons or entities. 45

The Second Report and Order began implementing the substantive requirements of section 332 by interpreting the statutory definitions of the terms “CMRS” and “PMRS.” 46 Specifically, the Commission determined that Congress intended the CMRS classification to apply to all mobile services that operate for profit and provide interconnected service to the public or a substantial portion of the public. 47 In applying this definition to existing mobile services, the Commission found that all common carrier mobile licensees fell within the CMRS classification. Also encompassed by the classification were certain private radio licensees in the Specialized Mobile Radio (“SMR”), Business Radio, 220–222 MHz and private paging services, regulated under Part 90 of the Commission’s Rules. 48


37 See Mobile Services NPRM, 8 FCC Rcd. at 7997, para. 44. The Mobile Services NPRM reads,

We therefore seek comment on how the new regulatory framework under section 332 should affect the regulatory classification of PCS. Specifically, we request comment on whether PCS should be uniformly treated as a commercial mobile service, as defined by section 332, or whether there are also potential applications of PCS that would constitute private mobile service under the statutory definition. We urge commenters to address these issues with specific reference to both narrowband and broadband PCS.

Id. 48 See Mobile Services NPRM, 8 FCC Rcd. at 7999, para. 54. It states,

We tentatively conclude that this section authorizes us to establish classes or categories of commercial mobile services and to promulgate regulations that vary among such classes. In addition, we tentatively conclude that this section authorizes us to establish regulatory requirements that differ for individual service providers within a class.

We invite comment on these tentative conclusions.

Id. The Budget Act gave the FCC wider authority to regulate the mobile services industry, but it and the FCC’s implementing orders also established a basis for the Commission to forbear from regulation when less government action might engender more competition. See, e.g., In re Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd. 1411 (1994); In re Further Forbearance from Title II Reg. for Certain Types of Commercial Mobile Radio Serv. Providers, Notice of Proposed Rulemaking, 9 FCC Rcd. 2164 (1994). So while revised section 332 provided that commercial mobile services were to be regulated as common carriers, the Commission is authorized to exempt or forbear from applying any of the provisions of Title II of the Act to commercial mobile radio carriers, except for sections 201, 202, and 208. See id. at 2164, para. 1. Section 201 requires common carriers to provide service upon reasonable request and upon reasonable terms, and to interconnect with other carriers upon order of the Commission. 47 U.S.C. §201 (1994). Section 202 forbids unjust or unreasonable discrimination. 47 U.S.C. §202 (1994). Section 208 provides for the filing of complaints to enforce these and any other Title II obligations of a common carrier. 47 U.S.C. §208 (1994). To exempt CMRS providers from a Title II requirement, the FCC must determine that it is not necessary to enforce the requirements of Sections 201 and 202 of the Act or to protect consumers and the public interest. See In re Further Forbearance from Title II Reg. for Certain Types of Commercial Mobile Radio Serv. Providers, Notice of Proposed Rulemaking, 9 FCC Rcd. 2164, para. 4 (1994).

39 See Mobile Services NPRM, 8 FCC Rcd. at 8001, para. 70.

40 In re Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, First Report and Order, 9 FCC Rcd. 1056 (1994) [hereinafter Mobile Services First Report and Order].

41 See id.


43 See Mobile Services First Report and Order, 9 FCC Rcd. at 1056, para. 1.

44 See id. at 1057, para. 9.

45 See id. at 1058, para. 10.


47 See id. at 1427, para. 43.

48 See id. at 1448–58, paras. 82–109.
Following the Second Report and Order, the Commission adopted a Further Notice of Proposed Rulemaking ("Further NPRM") on April 20, 1994, to address pending issues relating to the implementation of section 332. Specifically, the Commission sought to address the impact of the amended statute on the technical, operational and licensing rules for all mobile services, and particularly the rules affecting those Part 90 services that were reclassified as CMRS by the Second Report and Order. In the Further NPRM, the Commission proposed to amend its rules to ensure that competing CMRS services would be governed by comparable regulatory requirements and to eliminate inconsistencies in the regulation of CMRS services.

On May 19, 1994, the Commission revised the Further NPRM on its own motion to seek comment on the additional issue of whether to limit the amount of spectrum CMRS licensees may aggregate in a given geographic area.

Following the Second Report and Order, the FCC also issued a Public Notice dated July 8, 1994, setting forth the criteria for states to meet to extend or initiate CMRS rate regulation pursuant to section 332(c)(3)(B). The FCC required states to establish the following facts to attain jurisdiction over rates and entry:

(i) market conditions with respect to such [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such [CMRS] service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.

The Commission also listed examples of the types of evidence that would be considered in determining market conditions and the need for consumer protection:

(i) The number of [CMRS] providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state.

(ii) The number of customers of each [CMRS] provider in the state; trends in each provider’s customer base during the most recent annual period if annual data is unavailable; and annual revenues and rates of return for each [CMRS] provider.

(iii) Rate information for each [CMRS] provider, including trends in each provider’s rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

(iv) An assessment of the extent to which services offered by the [CMRS] providers the state proposes to regulate are substitutable for services offered by other carriers in the State.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

(vi) Specific allegations of fact regarding anti-competitive or discriminatory practices or behavior by [CMRS] providers in the State.

(vii) Evidence, information, and analysis demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon [CMRS] service subscribers.

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by [CMRS] service providers, including statistics and other information about complaints filed with the state regulatory commission.

The Third Report and Order addressed the issues raised in the Further NPRM. In this order, the Commission took four steps to implement both the broad goals of the Budget Act and the more narrowly focused requirements generated by its

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50 See In re Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Further Notice of Proposed Rule Making, 9 FCC Rcd. 2863 (1994) [hereinafter Mobile Services Further NPRM].

51 See id. at 2864, para. 2.

52 See id.


54 See Mobile Services Further NPRM, 9 FCC Rcd. at 2881-85, paras. 86-105.


56 Id. at 737.

57 Id.

58 In re Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Dkt. No. 93-252, Third Report and Order, 9 FCC Rcd. 7988 (1994) [hereinafter Mobile Services Third Report and Order].
August 9, 1994, statutory transition deadline. First, the Commission determined which reclassified services would be considered "substantially similar" to existing common carrier services in order to implement the Budget Act requirement that such services be subject to "comparable" regulation. The Commission concluded that services should be considered substantially similar if they compete or have the reasonable potential, broadly defined, to compete in meeting the needs and demands of consumers.

Second, the Commission revised Part 22 and Part 90 technical and operational rules to ensure that the services licensed under those parts were governed by rules that were indeed "comparable." One such revision was the adoption of wide-area licensing for 800 MHz and 900 MHz services to make them more like their cellular and PCS counterparts.

Third, to effectuate the broad congressional goal of ensuring that competition shapes the development of the CMRS market, the Commission adopted rules that capped at 45 MHz the total amount of combined broadband PCS, cellular and SMR spectrum in which an entity may have an attributable interest in any given geographic area. The Commission "adopt[ed] this cap as a minimally intrusive means of ensuring that the mobile communications marketplace remains competitive and retains incentives for efficiency and innovation," and made the cap applicable only to PCS, SMR and cellular licensees meeting the definition of CMRS.

Fourth, to carry out the Budget Act's licensing requirements, the Commission adopted uniform rules for the licensing of CMRS services, including reclassified services. It also concluded that competitive bidding procedures should be used to select from among mutually exclusive applications and modified its licensing rules for Part 22 and Part 90 CMRS services to adopt filing windows for competing initial applications. Moreover, it tentatively concluded in the Further NPRM and adopted a single, uniform application form for use by all CMRS and PMRS applicants in all land mobile services.

B. Other Section 332 Decisions by the Commission

In addition to the NPRMs and orders directly implementing section 332, the Commission has issued decisions in other proceedings that also define the scope and reach of section 332. For example, the Commission addressed the reach of section 332 in its decisions denying state petitions to regulate CMRS services pursuant to section 332(c)(3)(B). The FCC’s universal service orders have also added to the defining of section 332.

1. Denials of Regulatory Authority for States

As previously discussed, the FCC has denied every state petition requesting authority to continue regulating CMRS rates. Section 332 requires the FCC to examine state petitions to determine if the states sustained their statutory burden of demonstrating that "market conditions with respect to [commercial mobile radio] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory." In denying the state applications, the FCC concluded that a state must do more than merely show that market conditions for cellular service have been less than fully competitive in the past. In order to retain regulatory authority, a state must show that, given the rapidly evolving market structure in which mobile services are provided, the conduct and performance of CMRS providers ill-serve consumer interests by producing rates .

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Footnotes:
59 See id. at 7995, para. 6.
60 See id. at 7996, para. 10.
61 See id. at 7996, para. 12.
62 See id. at 8036, para. 80.
63 See id. at 8050, para. 113.
64 See Mobile Services Third Report and Order, 9 FCC Rcd. at 8100, para. 238; see also 47 C.F.R. § 20.6(a) (1998).
66 See Mobile Services Third Report and Order, 9 FCC Rcd. at 8114, para. 335; see also 9 FCC Rcd. at 8135, paras. 383, 8151, para. 210, 8153, para. 377; 8155, para. 383; 8157, para. 386; and 8160-61, paras. 393-94.
67 See id. at 8135, para. 328.
68 See id. at 8120, para. 293.
69 See supra note 17 and accompanying text.
71 See supra note 17 and accompanying text.
that are not just and reasonable, or are unreasonably discriminatory.\textsuperscript{78}

Based upon this standard, which many states consider a heightened standard, the FCC denied all of the state applications.\textsuperscript{74}

Connecticut was the only state to appeal the FCC’s denial.\textsuperscript{75} In Connecticut Department of Public Utility Control v. FCC,\textsuperscript{76} the Connecticut PUC acknowledged the FCC’s grant of authority to determine whether CMRS subscribers were adequately protected from unjust and unreasonable rates, but alleged that the FCC was bound to follow the explicit factors enunciated in the Second Report and Order.\textsuperscript{77} In effect, the PUC claimed that because the list of factors did not specifically include the “present-day impact of future market entry” in evaluating current market conditions, the FCC was precluded from considering this as a factor in denying Connecticut the ability to continue to regulate intrastate CMRS rates.\textsuperscript{78}

In upholding the FCC’s actions, the Connecticut PUC court focused on the fact that the Budget Act amendments to the 1934 Communications Act “dramatically revise[d] the regulation of the wireless telecommunications industry . . . .”\textsuperscript{79} The court noted the importance of the federal regulatory scheme and the necessity of preventing conflicting state regulations from impeding the development of this federal regulatory scheme.\textsuperscript{80}

The court concluded that although the factor had not been listed by the Commission in the Second Report and Order, it was “entirely appropriate for the Commission to take into account the present-day impact of future market entry in evaluating whether current market conditions are inadequate to protect consumers.”\textsuperscript{81} The court said the Commission did not improperly impose a heightened standard of proof on states by concluding that states had to clear “substantial hurdles” if they sought to continue or initiate cellular telephone regulation in circumvention of federal pre-emption.\textsuperscript{82}

2. Universal Service Orders

The FCC’s implementation of the federal universal service program is another proceeding in which the scope of section 332 has been further defined.\textsuperscript{83} Section 254(f) of the Act provides,

A State may adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.\textsuperscript{84}

The FCC’s Universal Service Order\textsuperscript{85} was the first opportunity the Commission had to address any perceived conflict between sections 254(f) and 332(c)(3)(A). In the Universal Service Order, the FCC evaluated the interplay between the provisions to address concerns raised by commentors in the universal service proceeding who argued

\textsuperscript{78} In re Petition on Behalf of the Louisiana Public Service Commission for Authority To Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana, Report and Order, 10 FCC Rcd. 7898, 7899, para. 6 (1995); see also In re Petition of New York State Public Service Commission to Extend Rate Regulation, Report and Order, 10 FCC Rcd. 8187, 8189–90, para. 16 (1995).

\textsuperscript{79} See supra note 47 and accompanying text.

\textsuperscript{74} See Connecticut Dep’t of Pub. Util. Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

\textsuperscript{75} See id.

\textsuperscript{77} See id. at 848.

\textsuperscript{78} See id.

\textsuperscript{73} Id. at 845.

\textsuperscript{70} See id. at 850.

\textsuperscript{81} Connecticut Dep’t of Pub. Util. Control v. FCC, 78 F.3d 842, 850–51 (2d Cir. 1996).

\textsuperscript{82} See id. at 851.

\textsuperscript{83} Congress defined “universal service” in the Telecommunications Act of 1996 as follows:

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—(A) are essential to education, public health, or public safety; (B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers; (C) are being deployed in public telecommunications networks by telecommunications carriers; and (D) are consistent with the public interest, convenience, and necessity.


that the provisions were inconsistent. The FCC concluded that the two statutes were not in conflict and then concluded that section 332(c)(3) and its prohibition on rate regulation of wireless service providers did not prohibit a state from assessing wireless service providers a surcharge to support universal service under section 254(f).86

In so holding, the FCC stated it "agree[d] with the Joint Board's recommendation that all telecommunications carriers that provide interstate telecommunications services must contribute to the support mechanism..."87 Further, the Commission stated that "[w]ith respect to the issue of whether states may require CMRS providers to contribute to state universal service support mechanisms," we agree with the Joint Board and find that section 332(c)(3) does not preclude states from requiring CMRS providers to contribute to state support mechanisms."88 This became the foundation for subsequent decisions holding that requirements for contribution to state universal service funds did not constitute rate regulation.

3. Pittencrieff Communications

The FCC again addressed the interaction between sections 254(f) and 332(c)(3)(A) in the Pittencrieff Communications decision.89 In this proceeding, the Commission denied Pittencrieff Communications's petition for a declaratory ruling.90 Pittencrieff requested in its petition that the FCC use its section 332 authority to preempt certain sections of the Texas law,91 which required CMRS providers operating in Texas to contribute to the state universal service fund.92 The Commission determined that nothing in section 332 precluded states from requiring CMRS providers to contribute on an "equitable and nondiscriminatory basis" to state universal service mechanisms.93

The Commission relied on the Universal Service Order84 for its conclusion in the Pittencrieff Order that section 332(c)(3) did not preempt Texas from requiring CMRS providers to make intrastate-based universal service contributions.95 The Commission held that Texas's requirement of contributions into the universal service fund was not "rate regulation" prescribed by the Communications Act, even though rates were influenced.96 Specifically, the Commission found that such state regulation fell within the "other terms and conditions" language of section 332(c)(3)(A).97

The Commission's most recent guidance concerning the scope of section 332 came in a Memorandum Opinion and Order ruling on a Petition for Declaratory Ruling filed by Southwestern Bell Mobile Systems, Inc. ("Southwestern Bell").98 In its petition, Southwestern Bell asked the Commission to make six declarations.99 First, Southwestern Bell requested that the FCC declare that Congress and the FCC have instituted a general preference that competitive rather than regulatory forces should govern the CMRS markets.100 The Commission granted this aspect of Southwestern Bell's petition.101 The Commission also granted Southwestern Bell's next request by declaring that it is accepted CMRS industry practice to charge in whole-minute units and that it is not unjust or unreasonable under 47 U.S.C. 201(b) to charge for incoming calls.102 Southwestern Bell also requested that the Commission declare that "the term 'call initiation' in the CMRS industry refers to a cellular customer activating his or her phone both to place an outgoing call and to accept an incoming call."103 The Commission declined to grant this portion of Southwestern Bell's petition, finding that the determination of whether call initiation includes charges for incoming calls should be based on the specific facts and circumstances

86 See id. at 9181, para. 791.
87 Id. at 9173, para. 777.
88 Id. at 9181, para. 791.
90 See id.
91 See id. at 1754, para. 37.
92 See id. at 1738, para. 7.
93 See id. at 1737, para. 4.
95 See Pittencrieff Order, 13 FCC Rcd. at 1741, para. 13.
96 See id. at 1746, para. 22.
97 See id.
99 See id. at 2, para. 3.
100 See id.
101 See id. at 5, para. 9 (stating, "We agree that, as a matter of Congressional and Commission policy, there is a 'general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation,' and we grant Southwestern's petition in this respect").
102 See id. at 2, paras. 3, 14.
103 Id. at 2, para. 3.
of each case.  

Southwestern Bell’s fourth request was for the FCC to find that “the definition of the term ‘rates charged’ in Section 332(c) (3) of the Communications Act . . . includes at least the element of a CMRS provider’s choice of which services to charge for and how much to charge for these services.” The Commission granted this request.  

The Commission considered Southwestern Bell’s fifth and sixth declaratory requests together. Southwestern Bell’s requested a declaratory ruling that federal law—namely 47 U.S.C. §332(c)(3)—exclusively governs “challenges to the ‘rates charged’ to end users by a CMRS provider, including charges for incoming calls and charges in whole-minute increments.” It also requested the converse: that section 332(c)(3) bars direct or indirect challenges to CMRS provider’s “rates charged.” Although the Commission found that section 332(c)(3) precludes states from prohibiting CMRS carriers from charging for incoming calls or charging in whole-minute increments, the Commission further found that state law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under section 332.

III. HOW CARRIERS HAVE TRIED TO USE SECTION 332.

Based upon the FCC’s rules and decisions concerning the scope of section 332, carriers have tried to use section 332 in many different ways: to defend against state claims in lawsuits, to trump zoning laws, to attempt to free themselves from universal service obligations, and to achieve other business objectives.

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104 See Southwestern Bell Order, supra note 98, at para. 17 (stating, “We decline to issue this requested ruling. The Commission has no special technical or policy expertise to illuminate the question of what constitutes ‘call initiation’ for either the outgoing or incoming calls of wireless carriers.”)  
105 Id. at 2, para. 3.  
106 See id. at 10, para. 20 (“. . . we find that the term ‘rates charged’ in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these”).  
107 Id. at 2, para. 3.  
108 See id.  
109 See id. at 11, para. 23 (stating, “We find that it is clear from the language and purpose of Section 332(c)(3) of the Act that states do not have authority to prohibit CMRS providers from charging for incoming calls or charging in whole minute increments. This would ‘regulate . . . the rates charged by . . . [a] commercial mobile service . . .’ We do not agree, however, that state contract or consumer fraud laws relating to the disclosure of rates and rate practices have generally been preempted with respect to CMRS.”)  
111 See id. at 714.  
112 See id.  
113 See id.  
114 See id.
The U.S. District Court for the Southern District of Texas found that it was not clear whether the case could be preempted by section 332.\textsuperscript{115} The court stated, “[Southwestern Bell] furnishes no direct authority for the proposition that a case filed in state court alleging rights only under state law can be removed under the Communications Act.”\textsuperscript{116} The court found that even if preemption did apply, it was not clear that Southwestern Bell could invoke the “extraordinary doctrine of ‘complete preemption.’”\textsuperscript{117} The court reasoned that Congress did not intend to completely preempt state law, because it specifically declined to prohibit the states from regulating the “terms and conditions” of CMRS service, including matters such as customer billing information and practices, billing disputes “and other consumer protection matters.”\textsuperscript{118} The court found further evidence leading it to decide against complete preemption in the “savings clause” of the Communications Act.\textsuperscript{119} The court stated, “Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.”\textsuperscript{120}

Other courts have come to similar conclusions in cases with fact patterns similar to Esquivel, DeCastro v. AWACS, Inc.,\textsuperscript{121} and Sanderson, Thompson, Ratledge & Zimmy v. AWACS, Inc.,\textsuperscript{122} were companion cases in the U.S. District Court for the District of New Jersey and the U.S. District Court for the District of Delaware, respectively. The claim in each case was the same: customers brought a class action suit in state court against AWACS, alleging failure to inform its customers that billing began when a call was initiated, rather than once a connection was made.\textsuperscript{123} In both cases, the plaintiffs argued that AWACS commenced billing for a call the moment a subscriber initiated a call by pushing the “send” button on the phone.\textsuperscript{124} After pressing the “send” button, a period of time elapsed during which the subscriber would not be in communication with the party to whom the call was made, but would be billed for the time.\textsuperscript{125} The customers alleged that this billing practice was contrary to “industry custom and practices.”\textsuperscript{126} AWACS removed the action to federal court under several theories, including that removal was proper under federal question jurisdiction because the Communications Act preempted the state-law class allegations.\textsuperscript{127} The customers then moved to remand back to state

\textsuperscript{115} See id. at 716.


\textsuperscript{117} Id. at 716. The doctrine of ordinary preemption stems from the Supremacy Clause contained in Article VI of the U.S. Constitution, which provides that federal law “shall be the supreme Law of the Land.” Cipollone v. Liggett Group, Inc., 505 U.S. 505, 516 (1992) (citing U.S. CONST. art. VI, cl. 2). Under the Supremacy Clause, state law that conflicts with federal law is preempted. See id. Under the doctrine of complete preemption, the Supreme Court has indicated that “Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character.” Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 65–64 (1987). When Congress completely preempts an area of state law, “any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.” Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987). The situations in which the Supreme Court has found complete preemption are limited; there are, in fact, only two settings in which the Court has concluded that Congress intended to completely preempt: (1) suits to enjoin a collective bargaining agreement under section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185 (1994), and (2) suits for benefits under or to enforce rights provided by a plan covered by the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. § 1132(a)(1)(B) (1994), pursuant to section 502(a)(1)(B). Congressional intent in enacting federal law is the “ultimate touchstone” in an ordinary preemption analysis. See Cipollone, 505 U.S. at 516–17. Congress’s intent to preempt state law in this manner may be demonstrated by the explicit language of a statute, by an actual conflict between state and federal law, or “if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’” Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see also Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 31 (1996). Ordinary preemption is generally a federal defense to a plaintiff’s suit and under the well-pleaded complaint rule does not provide a basis for federal question jurisdiction. See Metropolitan Life, 481 U.S. at 63 (1987). Under the doctrine of complete preemption, a plaintiff’s state law claim is not dismissed as barred by federal law, but instead is converted into a federal cause of action. See Caterpillar, 482 U.S. at 386–87. Like the doctrine of ordinary preemption, Congressional intent is the main focus of a complete preemption analysis. See Metropolitan Life, 481 U.S. at 66.

\textsuperscript{118} See Esquivel, 920 F. Supp. at 716; see also H.R. Rep. No. 103-111, § 5205, at 260.

\textsuperscript{119} See Esquivel, 920 F. Supp. at 716.

\textsuperscript{120} 47 U.S.C. § 414 (1994).

\textsuperscript{121} 935 F. Supp. 541 (D. N.J. 1996).

\textsuperscript{122} 958 F. Supp. 947 (D. Del. 1997).

\textsuperscript{123} See Sanderson, 958 F. Supp. at 951–52; DeCastro, 935 F. Supp. at 545.

\textsuperscript{124} See Sanderson, 958 F. Supp. at 952; DeCastro, 935 F. Supp. at 545.

\textsuperscript{125} See Sanderson, 958 F. Supp. at 952; DeCastro, 935 F. Supp. at 545.

\textsuperscript{126} Sanderson, 958 F. Supp. at 951–52; DeCastro, 935 F. Supp. at 545.

\textsuperscript{127} See Sanderson, 958 F. Supp. at 951; DeCastro, 935 F.
court.\textsuperscript{128}

The courts granted the plaintiffs’ motions to remand to state court, finding that the Communications Act did not require removal of the plaintiffs’ claims to federal court under the complete preemption doctrine.\textsuperscript{129} As in Esquivel, the courts based their decision on the legislative history of section 332(c)(3)(A), noting that while states could not regulate rates or entry for CMRS services, they could still regulate the terms and conditions of service.\textsuperscript{130} Both courts also noted the importance of the Act’s “savings clause.”\textsuperscript{131} With distinctly federalist overtones, the court said that section 332(c)(3)(A) “permits state regulation of cellular telephone service providers in all areas other than the providers’ entry into the market and the rates charged to their customers,”\textsuperscript{132} and therefore, plaintiffs’ claims concerning AWACS’s billing practices could be properly heard before a state court.\textsuperscript{133} Both courts asserted that AWACS’s arguments confused the distinction between complete preemption and ordinary preemption; only complete preemption is “an appropriate basis for federal question jurisdiction.”\textsuperscript{134}

In Tenore v. AT&T Wireless Services,\textsuperscript{135} the issue was whether the trial court was correct in dismissing appellants’ state law claims based upon federal preemption under section 332(c)(3)(A), among other theories.\textsuperscript{136} This case involved a class action suit against respondents AT&T Wireless Services and McCaw Cellular Communications, Inc., doing business as CellularOne.\textsuperscript{137} Appellants claimed that CellularOne “engaged in ‘deceptive, fraudulent, misleading and/or unfair conduct’ by not disclosing its practice of ‘rounding’ airtime in order to ‘induce cellular customers to use its cellular service, and/or in order to unfairly profit.’”\textsuperscript{138} Rounding was described as “a common billing practice in the cellular and long distance telephone industry where fractions of a minute are rounded up to the next highest minute.”\textsuperscript{139}

Appellants claimed rounding was “contrary to the ‘Service Agreement’ . . . which states that the customer is billed only for ‘the time you press send until the time you press end.’”\textsuperscript{140} AT&T moved for dismissal of the complaint based upon federal preemption of state law claims under section 332(c)(3)(A) and the doctrine of primary jurisdiction.\textsuperscript{141}

The lower court found that as a matter of law plaintiffs’ state law claims were preempted by section 332(c)(3)(A) and dismissed plaintiff’s claims.\textsuperscript{142} In appealing the lower court’s decision, the appellants argued that the express language of section 332 allows states to regulate “the other terms and conditions of commercial mobile service” that do not relate to market entry or rate regulation.\textsuperscript{143} They asserted that these “other terms and conditions” included a carrier’s “advertising, marketing and contracting, which are distinct from the federally regulated issues of rates

\textsuperscript{128} See id.
\textsuperscript{129} See Sanderson, 958 F. Supp. at 951; DeCastro, 935 F. Supp. at 555.
\textsuperscript{130} See DeCastro, 935 F. Supp. at 552 (citing Esquivel, 920 F. Supp. 713).
\textsuperscript{131} See Sanderson, 958 F. Supp. at 958. See also 47 U.S.C. § 414 (“Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.”).
\textsuperscript{132} DeCastro, 935 F. Supp. at 552.
\textsuperscript{133} See id. at 555.
\textsuperscript{134} Sanderson, 958 F. Supp. at 957.
\textsuperscript{135} 962 P.2d 104 (Wash. 1998) (en banc).
\textsuperscript{136} See id. at 105.
\textsuperscript{137} See id.
\textsuperscript{138} Id. at 106.
\textsuperscript{139} Id.
\textsuperscript{140} Tenore, 962 P.2d at 106.
\textsuperscript{141} See id. at 107. The doctrine of primary jurisdiction promotes a proper relationship between the court system and the administrative agencies charged with particular regulatory duties. See Nader v. Allegheny Airlines, Inc., 426 U.S.
\textsuperscript{142} See id.
\textsuperscript{143} See id. at 111.
and entry.”

The court concluded that the state law claims brought by appellants and the damages they sought did not implicate rate regulation prohibited by section 332 of the Communications Act and therefore were not preempted. The court found that the language of “terms and conditions” clause of section 332 limits the preemptive reach of that provision, while the “savings clause” is indicative of the intent of Congress to preserve state law claims for billing or advertising that do not attack market entry or rates charged by CMRS providers. The court therefore reversed the judgment of the lower court which dismissed appellants’ class action complaint based upon federal preemption of state law claims under section 332(c)(3)(A) and other theories.

Digital Communications Network, Inc., v. AT&T Wireless Services and AirTouch Cellular, Inc., a more recent case interpreting section 332, is one of the few cases where a court has found a claim to be preempted by section 332. The plaintiffs in this case were California corporations that resold cellular telephone service and cellular telephone equipment. Defendants were the cellular license holders, who were authorized to provide CMRS service using their own network on licensed radio frequencies within the contractually limited geographic areas.

In March 1999, defendant AT&T began offering to customers in the Los Angeles area a “one-rate” plan, which permitted cellular telephone users to call nationwide at a fixed monthly price. It also eliminated roaming charges, which were “applicable to the allotted number of minutes of cellular telephone usage provided under each plan.” Plaintiffs complained that these “one-rate” plans were not made available to resellers at wholesale rates, causing them to lose a number of customers. Plaintiffs argued that defendants were required to offer them discounted rates on the one-rate plans pursuant to FCC and CPUC laws and regulations.

Believing that the “one-rate” plans would be especially devastating to their businesses and customer base, plaintiffs filed a complaint in federal court asserting that AT&T and AirTouch engaged in unjust and unreasonable practices by failing to offer them the one-rate plans at wholesale prices. Defendants argued that plaintiff’s causes of action were preempted under section 332. The court observed that there were strong arguments on both sides of the question of whether enforcement of reseller margins constitutes rate regulation preempted under section 332. On one hand, the court noted that section 332 provides that “no state . . . shall have any authority to regulate . . . the rates charged by any commercial mobile service.” On the other hand, the court recognized that the legislative history provides that states may impose a “requirement that carriers make capacity available on a wholesale basis.”

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144 Id.
145 See Tenore, 962 P.2d at 117.
146 See id. at 112.
147 See Tenore, 962 P.2d at 117-18.
150 See id. at 1195. As resellers, plaintiffs would purchase telephone numbers, cellular telephone service and equipment from defendants for their own accounts and sell cellular telephone services and equipment to individual and corporate customers. See id.
151 See id.
152 Id. at 1195.
154 Specifically, plaintiffs alleged a cause of action pursuant to section 17200 of the California Business and Professions Code, CA Bus. & Prof. § 17200, claiming unfair competition and intentional interference with economic advantage. See id. Their federal claims were based on the argument that AirTouch violated three sections of the Communications Act and the FCC regulations implementing those portions of the Act. See id. Plaintiffs argued that defendants violated section 201(a) of the Act, 47 U.S.C. § 201(a), by refusing to offer “resale versions of the ‘one rate’ programs offered to consumers,” section 201(b) of the Act, 47 U.S.C. § 201(b), by engaging in unjust and unreasonable practices and section 202(a), 47 U.S.C. § 202(a), by unjustly and unreasonably discriminating against plaintiffs. See id. In May 1999, plaintiffs discovered that defendant AirTouch also planned to offer a “one rate plan” and wanted to know “whether these plans would be offered at wholesale rates.” See id. AirTouch said that its “one rate” plans were not going to be offered to resellers under any terms. See id.
155 See id.
157 See id. at 1198.
158 Id.
159 Id. (quoting H.R. REP. No. 103-111, at 261). The court found that “this point was elaborated on by the House Subcommittee Chairman, Congressman Markey, who said, ‘[t]he intent [of the Budget Act] is not to disturb the principle that carriers can be obligated to offer services to resellers at wholesale prices.’ ” See id.; see also H.R. REP. No. 103-111, at 261 (statement of Rep. Markey).
The court deferred to the FCC’s administrative expertise:

The FCC has said that a state’s review of contractual agreements between two or more CMRS providers, including interconnection agreements and roaming agreements entered into by CMRS providers, also falls within the ‘other terms and conditions’ language of section 332(c)(3) to the extent that such review does not directly affect end-user rates.160

Under this guidance from the FCC, the court found “it could be argued that states may continue to regulate the rates charged by wholesale CMRS providers to reseller CMRS providers, so long as there is no ‘direct’ effect on the rates charged to the ultimate consumer.”161 But the court found it also feasible to argue that the FCC’s directive encouraged “the maintenance of the reseller margin (the discount off of its retail rates that a facilities-based cellular provider must give to resellers), since [maintaining the reseller margin] does not directly regulate the rates that either the facilities-based carrier or the reseller charges the ultimate consumer.”162

However, because the express language of the statute provides that states may not “regulate” rates, the court found that plaintiff’s claims were preempted,163 stating:

While the matter is not entirely free from doubt, in our view this statutory language prohibits this Commission from setting a particular numerical margin that must be provided to cellular resellers. By requiring that a particular numerical margin be maintained, we would effectively be prescribing the maximum rate that a facilities-based cellular carrier could charge a reseller (without also changing its retail rate). We believe that such action would amount to a regulation of the rates of the facilities-based carrier, and therefore is preempted.164

B. The Sixth Circuit’s Approach to Section 332

Four federal Circuit Courts have opined on the reach of section 332. The Sixth Circuit was the first to reach the issue in *GTE Mobilnet v. Johnson*,165 and it is the only circuit court to have ruled on section 332 in regard to a billing dispute.166 In *GTE Mobilnet*, cellular telephone service providers

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160 *Digital Communications Network, Inc.*, 63 F. Supp. 2d at 1198.
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 111 F.3d 469 (6th Cir. 1997).
166 *Compare Sprint Spectrum L.P. v. SCC of Kansas*, 149 F.3d 1058 (10th Cir. 1998), *with Cellular Telecommunications Industry Ass’n v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999), *GTE Mobilnet* and New Par sought section 332 protection after Cellnet, a cellular reseller, filed a complaint with the Public Utilities Commission (“PUC”) of Ohio alleging that the cellular carriers engaged in discriminatory and anticompetitive conduct by charging lower rates to affiliated entities that competed directly with Cellnet.167 *GTE Mobilnet* and New Par filed for an injunction in federal district court to prevent the state commission from adjudicating the case,168 arguing that section 332(c)(3)(A) explicitly preempted the state commission from hearing the case because the relief sought would involve rate regulation by the state commission.169

The district court ruled that section 332 preempted the PUC from considering Cellnet’s complaint because Cellnet sought relief requiring the state commission to regulate rates. The court granted plaintiffs a preliminary injunction that prohibited the Ohio Commission from exercising jurisdiction over the aspects of Cellnet’s complaint alleging that the cellular carriers engaged in discriminatory and anticompetitive conduct. Additionally, the preliminary injunction enjoined the PUC from exercising any control over the rates charged by the cellular carriers.170 The district court based its decision on its finding that “the plain language of [section 332] reflected Congress’s clear intent to preempt the states from controlling discriminatory rates.”171

Claiming that section 332(c)(3)(A) did not facially preempt state law, the Ohio Commission appealed the grant of the preliminary injunction to the Sixth Circuit, arguing that the district court should have abstained from hearing the dispute and allowed the state commission to determine the preemption issue.172 The Sixth Circuit agreed, holding that section 332(c)(3)(A) did not present a facially conclusive instance of preemption.173 In reaching this conclusion, the court questioned whether congressional intent to preempt the regulation of discriminatory rates by state commis-
sions could be found in Congress’s mandate to the FCC to determine if “market conditions with respect to such [CMRS] services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.”

The court rejected such an interpretation, finding that the “broad-based showing” imposed upon the states under subsection (i) to gain authority to regulate CMRS rates did not compel the district court’s conclusion that states may no longer adjudicate individual cases involving specific allegations of anti-competitive or discriminatory misconduct under state law.

After rejecting the cellular carriers’ claim of “facially conclusive” preemption under section 332, the Sixth Circuit assessed whether the two-prong test it had articulated in prior cases required the Ohio Commission to abstain from adjudicating Cellnet’s claims. This analysis first involved determining whether state and federal courts possess concurrent jurisdiction to decide a preemption issue and if so, determining whether adjudication at the state level is preferable under the principles enunciated by the Supreme Court in Younger v. Harris. After determining the existence of concurrent jurisdiction and the existence of ongoing state proceedings simultaneously implicating important state interests and presenting adequate opportunities to raise constitutional issues, the Sixth Circuit concluded the federal district court should have abstained from considering the cellular carriers’ motion for relief and permitted the state commission to determine the preemption issue.

While federalist overtones can be found in the Sixth Circuit’s decision in the GTE Mobilnet case, the court did not discuss a fundamental section 332 argument. It did not address whether the allegedly discriminatory rates constituted a consumer protection issue subject to state jurisdiction pursuant to section 332’s “other terms and conditions” language. The consumer protection argument was an approach heavily relied upon by the federal district courts in Esquivel and its progeny, highlighting the dual regulatory scheme envisioned by Congress for wireless services. Rates and entry into the market were specifically designated as federal issues, while all “other terms and conditions” of service were to be left to the states. This issue was raised in GTE Mobilnet, but the Sixth Circuit based its findings upon precedent and never reached the central issue of how Congress intended the dual regulatory scheme to apply to the governing of wireless services. The Sixth Circuit’s reliance upon other legal theories did little to define the scope of section 332 and left the lower courts with no real guidance in terms of how to apply section 332 when considering state-law claims.

IV. THE RELATIONSHIP OF SECTION 332 TO UNIVERSAL SERVICE

Perhaps the most debated way in which carriers have tried to use section 332 is attempts to extricate themselves from state universal service obligations. As part of the Telecommunications Act of 1996, Congress passed section 254, which allows states to create and require contributions to universal service funds. A state may “adopt regulations not inconsistent with the Commission’s rules to preserve and advance universal service.” Acting pursuant to section 254, several states adopted statutes requiring all intrastate telecommunications providers, including the wireless providers, to contribute to state universal service funds.

Perhaps the most well-known case decided on this basis is Mountain Solutions, Inc. v. State Corp. Commission of Kansas. In Mountain Solutions, the U.S. District Court for the District of Kansas considered the interplay between sections 332(c)(3)(A) and 254(f) in determining the propriety of requiring CMRS providers to contribute to a state-sponsored universal service fund in Kan-
The Kansas legislature had adopted section 66-2008, which mandated the Kansas Commission to require equitable nondiscriminatory KUSF contributions from "every telecommunications carrier, telecommunications public utility and wireless telecommunications service provider that provides intrastate telecommunications services." During the implementation of section 66-2008 at the Kansas Commission, the wireless providers argued that section 332 preempted section 66-2008's wireless provider contribution requirement, but the Kansas Commission rejected this argument in its order establishing the KUSF.

Upon the Commission's affirmation of its decision in an Order on Reconsideration, the wireless providers filed suit in the federal district court challenging the Commission's finding that it was not preempted by federal law from requiring wireless provider contributions. Broadly stated, the question the wireless companies presented to the court was whether section 332(c)(3)(A) exempted CMRS providers from the section 254(f) provision allowing states to require intrastate telecommunications providers to contribute to state universal service funds.

While the district court considered their request for permanent injunctive and declaratory relief, the wireless providers sought a preliminary injunction to prevent the Commission from requiring them to contribute to the fund or from fining them for failure to contribute. The district court denied the wireless providers' request for a preliminary injunction. Specifically, the court rejected the petitioners' argument that section 332 prohibits states from requiring CMRS providers to contribute to state universal service funds, holding that the preemptive reach of section 332 was limited.

The wireless providers appealed to the Tenth Circuit in Sprint Spectrum, LP v. SCC of Kansas, making that circuit the second to reach section 332 issues. In the Tenth Circuit appeal, the wireless providers again argued that section 332 preempted section 66-2008 of the Kansas statute. The wireless providers argued that the second sentence of section 332(c)(3)(A) applies specifically to "mobile services," and that the parenthetical language in the second sentence set forth the only condition under which a state could require wireless providers to contribute to a universal service fund: when there is a finding that wireless service is a substitute for land line service for a substantial portion of the state.

They argued that the regulatory limitations in the second sentence were not overruled by the Telecommunications Act of 1996, including section 254(f), because the 1996 Act allowed only for express modification of earlier federal statutes.

The Kansas Commission replied by admitting that it never found wireless service to be a substitute for land line service in Kansas. The Kansas Commission argued that no such finding was necessary because section 332(c)(3)(A) did not contradict the mandate of section 254(f) that "[e]very telecommunications carrier" was required to contribute to the KUSF, without exception. In fact, according to the Commission, the first sentence of section 332(c)(3)(A) supported its reading of section 254(f) by clarifying that, although states may not regulate "entry" or "rates," the states may "regulate[e] the other terms and conditions of service on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.


See id. at 1061.

See id. at 1060-61.

See id. at 1061.

The first sentence of section 332(c)(3)(A) reads, Notwithstanding sections 152(b) and 221(b) of this title, no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that his paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services.

The Kansas Commission argued that “other terms and conditions” included KUSF contribution requirements. In defining the second sentence of section 332(c)(3)(A), the Kansas SCC read that sentence to apply to the prohibition of rate and entry regulations only so far as a state wished to impose entry and rate regulations related to universal service.

The court agreed with the FCC’s finding that section 332(c)(3)(A) did not preempt states from requiring wireless providers to contribute to state universal service funds and found it was not arbitrary, capricious, or manifestly contrary to the statute at issue. The court noted that because section 254(f) specifically granted states the authority to require contributions for universal service from all telecommunications carriers, and in fact, mandated compliance by all carriers (“Every telecommunications carrier . . . shall contribute . . .”), the state commission would apparently be in violation of federal law if it established a universal service fund but did not require contributions from wireless providers. In addition, read in its entirety, the second sentence of section 332(c)(3)(A) is limited in scope to that subparagraph and, thus, did not limit and was not affected by section 254(f). The Tenth Circuit therefore found that the FCC’s rulings at issue were not “arbitrary, capricious, or manifestly contrary to the statute” and thereby gave the FCC’s rules controlling weight.

Unlike the Sixth Circuit’s approach in GTE Mobilnet, the Tenth Circuit’s decision significantly helped to define the boundaries of section 332. While somewhat limited because of its relation solely to universal service, the Tenth Circuit’s analysis did acknowledge Congress’s attempts to establish a dual regulatory system, and parsed out those powers belonging to the federal government from those saved for the states.

In addition to the Sixth and Tenth Circuits, the D.C. and Fifth Circuits have also addressed section 332 issues. The D.C. Circuit case is another universal service decision based on appeal of the FCC’s Pittencrieff Communications Order. Like the Tenth Circuit, the D.C. Circuit also found sections 332(c)(3)(A) and 254(f) to be harmonious.

In Cellular Telecommunications Industry Association v. FCC, the Cellular Telecommunications Industry Association, along with two CMRS providers, AirTouch Communications, Inc., and Sprint Spectrum, L.P. (collectively “CTIA”), petitioned for judicial review when the FCC denied Pittencrieff’s petition for declaratory ruling, which urged the Commission to rule that section 332(c)(3)(A) precluded states from imposing wireless providers with state-based universal service obligations. Specifically, Pittencrieff was opposed to contributing to two state-run universal service programs pursuant to the Texas Public Utility Regulatory Act of 1995. After notice and comment, the Commission denied the petition for declaratory ruling on the ground that the Texas’s contribution requirements did not constitute rate or entry regulation of wireless services, the sort of regulation section 332(c)(3)(A) preempts. The FCC allowed Texas to require CMRS service providers doing business in Texas to contribute annually to the state-run universal service programs.

In the Commission’s view, the Texas law fell within the “other terms and conditions” language of the first sentence of section 332(c)(3)(A) and thus was within the state’s lawful authority. The Commission also reasoned that to interpret section 332(c)(3)(A) otherwise would contradict section 254(f), which permits a state to require universal service contri-

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202 Sprint Spectrum, L.P. v. SCC of Kansas, 149 F.3d at 1061.
203 See id.
204 See id.
205 See id. at 1061-62.
206 See id.
207 Id. at 1061; see also Chevron v. National Resources Defense Council, 467 U.S. 897, 842-44 (1984) (discussing the appropriate test for court review of an administrative agency’s statutory interpretation).
208 See Sprint Spectrum, 149 F.3d at 1062. The court upheld the district court’s ruling that the wireless providers did not show a substantial likelihood of success on the merits and was in accord with the FCC’s rules and found its decision was not an abuse of discretion. See id.
210 168 F.3d 1332 (D.C. Cir. 1999).
211 See id. at 1334.
215 See Pittencrieff Order, 13 FCC Rcd. at 1737, para. 16.
butions from every telecommunications carrier providing intrastate telecommunications services in the state.\textsuperscript{216} The denial of Pittencrief's petition was also consistent with the Commission’s prior Universal Service Order, which found that section 332(c)(3)(A) did not preempt any-

thing.\textsuperscript{223} The court found that all the preempts is done in the first sentence;\textsuperscript{224} while the second and third sentences contain exceptions.\textsuperscript{225} Accordingly, the court determined that CTIA’s position that the second sentence itself, preempts the Texas statute could not be correct, because the second sentence does not preempt and it does not forbid.\textsuperscript{226} The court held that CTIA failed to demonstrate that its interpretation of section 332(c)(3)(A) was the only permissible one, or that the Texas universal service laws were rate or entry regulation.\textsuperscript{227} The court noted that, consistent with rules of statutory construction, the Commission’s interpretation of section 332(c)(3)(A) gave meaning to each sentence, which fairly reflects the statute’s purpose—to limit state rate and entry but not universal service regulation—and further, harmonizes section 332(c)(3)(A) and section 254(f).\textsuperscript{228} Thus, the court found no basis for setting aside the Commission’s Pittencrief decision.\textsuperscript{229}

The Fifth Circuit has most recently ruled on section 332, in \textit{Texas Office of Public Utilities Counsel v. FCC.}\textsuperscript{230} In this case, which presented another challenge to state-imposed universal service obligations, the Fifth Circuit acknowledged that it was a "convincing challenge" to the FCC’s determination that section 332 was not a bar to state-imposed universal service payments by CMRS carriers.\textsuperscript{231} The court nevertheless upheld the FCC’s decision to allow states to impose universal service contribution obligations on CMRS carriers, based on a step-one \textit{Chevron} analysis.\textsuperscript{232} Perhaps hinting at some discomfort with its \textit{Chevron} step-one analysis, however, the Fifth Circuit noted that “[e]ven if the CMRS providers are right that the plain language does not unambiguously support the FCC’s reading, we would defer to the FCC’s reasonable interpretation under \textit{Chevron} step two.”\textsuperscript{233} With this reasoning, the Fifth Circuit essentially

\begin{itemize}
\item \textsuperscript{216} See id.
\item \textsuperscript{217} See \textit{Universal Sevice Order}, 12 FCC Rcd. 8776, 9181-82 (1997).
\item \textsuperscript{218} See 47 U.S.C. § 332(c)(3)(A) (1994).
\item \textsuperscript{219} \textit{Cellular Telecomm. Indus. Ass’n}, 168 F.3d at 1335.
\item \textsuperscript{220} See id.
\item \textsuperscript{221} See id.
\item \textsuperscript{222} See id.
\item \textsuperscript{223} See id. at 1335-36.
\item \textsuperscript{224} See \textit{Cellular Telecomm. Indus. Ass’n}, 168 F.3d at 1335-36.
\item \textsuperscript{225} See id.
\item \textsuperscript{226} See id. at 1335.
\item \textsuperscript{227} See id. at 1336.
\item \textsuperscript{228} See id. at 1336-37.
\item \textsuperscript{229} See id.
\item \textsuperscript{230} 183 F.3d 393 (5th Cir. 1999).
\item \textsuperscript{231} See id. at 430.
\item \textsuperscript{232} See id. at 433. See also \textit{Chevron}, 467 U.S. at 842-43. The Court defined the \textit{Chevron} step one as follows: “First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” \textit{Id.}
\item \textsuperscript{233} Id. at 433 n.66. See also \textit{Chevron}, 467 U.S. at 843. The \textit{Chevron} Court stated, If Congress has not directly addressed the precise ques-
adopted the D.C. Circuit's interpretation in *Cellular Telecommunications Industry Association v. FCC*, finding that the FCC's reconciliation of sections 254(f) and 332(c)(3)(A) would permit the following understanding of the statute:

States (1) in general can never regulate rates and entry requirements for CMRS providers; (2) are free to regulate all other terms and conditions of CMRS service; (3) may regulate CMRS rates and entry requirements when they have made a substitutability finding in connection with universal service programs; and (4) may also regulate CMRS rates if they petition the FCC and meet certain statutory requirements, including either substitutability or unjust market rates.\(^{234}\)

The D.C. and Fifth Circuits' ultimate decisions are similar to the Tenth Circuit's judgment in the *Mountain Solutions* appeal;\(^{235}\) although they reinforce the reasoning of the Tenth Circuit's decision, they do not add much more to articulating the parameters of section 332 beyond the universal service debate. The only noticeable difference between the decisions is that the Tenth and Fifth Circuits adopted *Chevron* analyses in their decisions, while the D.C. Circuit focused on the fundamentals of statutory construction. All three courts, however, came to the same conclusion in allowing the state universal service programs to stand.\(^{236}\)

While the Tenth, Fifth and D.C. Circuits have found common ground, there is one state court that has disagreed and found a state universal service program to be preempted by section 332. *Metro Mobile CTS v. Connecticut Department of Public Utility Control*\(^{237}\) involved a challenge to a Connecticut PUC decision requiring CMRS providers to contribute to the Connecticut state universal service fund established pursuant to the universal service provisions adopted in the Telecommunications Act of 1996.\(^{238}\) Specifically, the court assessed the interplay between the two section 332(c)(3)(A) phrases: (1) "this paragraph shall not prohibit a state from regulating the other

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\(^{234}\) See *id.*

\(^{235}\) See *Sprint Spectrum L.P. v. SCC of Kansas*, 149 F.3d 1058 (10th Cir. 1998).

\(^{236}\) See *Cellular Telecomm. Indus. Ass'n v. FCC*, 168 F.3d at 1386–37 (D.C. Cir. 1999); Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 398 (5th Cir. 1999); *Sprint Spectrum*, 149 F.3d at 1062.


\(^{238}\) See *id.* at *1*–*2*.

\(^{239}\) *Id.* at *2*–*3*.

\(^{240}\) *Id.* at *3*.

\(^{241}\) See *id.* at *3*.


\(^{243}\) See *id.* at *7*.
V. SECTION 332 AS A DEVICE TO TRUMP ZONING LAWS

While the most prevalent uses of section 332 are as a defense against state-based customer complaint claims and as a mechanism to avoid state-based universal service payments, carriers also have attempted to use the preemption provision to avoid state zoning laws.

In Sprint Spectrum, L.P. v. City of Medina, Sprint Spectrum alleged that a six-month moratorium on the issue of new special-use permits for wireless communications facilities, imposed by the city of Medina, Washington, violated section 332(c)(3)(A), among other laws. Because of its location, Medina was a prime area for the placement of wireless telecommunications antennas, and the city was concerned that it would become an “antenna farm.” The city argued that the moratorium was necessary to allow it time to assess the “flurry of applications” that was expected in response to the passage of the Telecommunications Act of 1996. The measure, which suspended only the issuance of permits and not the processing of applications, was enacted so that the city council would have time to study the “requirements of the entire spectrum of wireless providers.” Sprint, who had just won PCS licensing rights for the geographic area including the Medina, argued that the moratorium threatened it with irreparable harm and would cause it to lose large amounts of money, because Sprint would be delayed in obtaining full coverage of the geographic region. Sprint’s section 332 argument was that the moratorium violated the provision that “no state or local government shall have any authority to regulate the entry of . . . any commercial mobile service or any private mobile service.”

The court found that moratorium on issuance of new special use permits for wireless communications facilities did not violate section 332, noting that “[n]othing in the record suggests that this is other than a necessary and bona fide effort to act carefully in a field with rapidly evolving technology. Nothing in the moratorium would prevent Sprint’s application, or anyone else’s, from being granted.” In response to Sprint’s 332 claim, the Court found that Sprint’s argument implied that section 332 bars any rejection by local government of wireless provider’s application for zoning variance. The court found this to be contrary to the intent of the Telecommunications Act of 1996, which specifically preserves local zoning authority. Therefore, the Court found that the City of Medina’s moratorium did not “regulate the entry” of any applicant within the meaning of section 332, and allowed the city’s temporary moratorium to stand.

VI. CONCLUSION

In Federalist No. 7, Hamilton wrote about dissension between the states and the contentiousness he feared would ensue if the states did not join into one union. In addressing what he called “competitions of commerce,” Hamilton said, “Each state, or separate confederacy, would pursue a system of commercial policy peculiar to

245 See id. at 1037.
246 See id.
247 See id.
248 Id. at 1038–39.
249 Id. at 1040; see also 47 U.S.C. § 332(c)(3)(A) (1994).
250 Medina, 924 F. Supp. at 1040. 
251 See id. at 1040.
252 Other courts have not been as accepting of zoning moratoria. In Sprint Spectrum, L.P. v. Jefferson County, 968 F. Supp. 1457 (1997), the U.S. District Court for the Northern District of Alabama struck a moratorium enacted by Jefferson County, Alabama. Jefferson County adopted three moratoria in total, the first of which was very similar to the moratorium adopted by the City of Medina; it was enacted to give the county time to establish review procedures for an influx of rezoning applications that was expected after the passage of the Telecommunications Act of 1996. See id. at 1461. Neither the first nor the second moratoria were never challenged. See id. at 1461–62. The third moratorium, however, was challenged by Sprint and Nextel, who argued that the County did not comply with procedural requirements in the adoption of the moratorium, and therefore the enactment was void under state law. See id. at 1463. The court compared Jefferson County’s moratorium with that in Medina, and found that “[t]he facts of this case have little in common with Medina.” See id. at 1466. The court compared the third moratorium to Medina’s, and found that the time difference in the enactments was the key factor: Jefferson County’s moratorium came 15 months after the enactment of the Telecommunications Act of 1996, while Medina’s came only 5 days after the passage of the 1996 Act. See id. Additionally, Medina’s moratorium did not suspend the processing of applications, only the issuance of permits, while Jefferson County’s suspended the processing of applications and the issuance of permits. See id.; see also AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach, 979 F. Supp. 416 (E.D. Va. 1997); Sprint Spectrum, L.P. v. Town of Farmington, 1997 WL 631104 (D. Conn. 1997).
253 The Federalist No. 7 (Alexander Hamilton).
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Itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent.\footnote{254}

Such "peculiarized" and "balkanized"\footnote{255} commercial policies were exactly the target of section 332. In passing revised section 332 in 1993, Congress revamped the mobile wireless regulatory scheme to provide a national framework within which wireless services and competition could flourish. Federal preemption of certain specified areas was a necessary component of the enactment, so as to free carriers from unnecessary delays from state regulatory authorities and to allow for more efficient launching of new services.

Congress intended section 332 to preempt state regulations that had been hurdles in the rapid development of wireless services; it therefore set forth a regulatory framework that was federalist in nature, whereby rates and entry were to be in the jurisdiction of the FCC while all other terms and conditions of service were the domain of the states. This framework removed one of the major obstacles CMRS carriers faced in providing wireless service—gaining state-by-state certifications—allowing service providers to more quickly get into the market, launch new services, and ultimately, promote competition.

The FCC's implementation of section 332 has in many ways given effect to the intent of Congress, but it has misinterpreted or ignored that intent in several proceedings. The Commission's recent Memorandum Opinion and Order addressing Southwestern Bell's Petition for Declaratory Ruling is an example of how the FCC is successfully implementing section 332; in that Memorandum Opinion and Order, the FCC used its preemptive authority to specifically safeguard carriers from state requirements that were impeding the competitive abilities of carriers. In other contexts, however, such as in regard to universal service, the Commission has ignored the intent of Congress, and has allowed states to impose obligations on CMRS carriers that are disallowed by the plain language of section 332.

While the FCC's implementation of section 332 has, in many ways, established a solid foundation for the governing of wireless services on a national level, the courts have done little to sharpen the definition of section 332 because of their reluctance to thoroughly explore section 332's limits. Four circuit courts have reached section 332 issues; the Sixth Circuit circumvented the substantive section 332 issues by basing its findings on precedent unrelated to section 332. The Tenth, Fifth and D.C. Circuits have contributed more to the defining of section 332, but their decisions are somewhat limited in scope, as they deal specifically with state-imposed universal service obligations.

Carriers, therefore, are left with little guidance concerning the scope of section 332 beyond the universal service debate; clearly, these carriers will continue to challenge state enactments the carriers perceive as preempted by section 332. Presumably, courts will eventually be forced to specifically enumerate the protections provided in section 332 for carriers involved in billing and other disputes at the state level. Carriers will, of course, push for a uniform, federal policy governing CMRS services, as such a policy is consistent with the interstate service that so many CMRS providers provide. A uniform national policy will allow carriers to devote their resources to new services and will lead to greater competition. Consumers will be the ultimate beneficiaries of a "federalist" policy, not one that is "balkanized state by state."\footnote{256}

\footnote{254} Id.
\footnote{255} Id. in re Petition of Arizona Corporation Commission to Extend State Authority Over Rate and Entry Regulation of all Commercial Mobile Radio Services, Report and Order and Order on Reconsideration, 10 FCC Red. 7824, 7828, para. 15 (1995) (stating, "As the legislative history of [the Omnibus Budget Reconciliation Act] makes plain, Congress intended those building blocks to establish a national regulatory policy for CMRS, not a policy that is balkanized state-by-state").
\footnote{256} Id.