

**SUBSIDIZED RURAL TELEPHONY AND THE  
PUBLIC INTEREST:  
A CASE STUDY IN COOPERATIVE  
FEDERALISM AND ITS PITFALLS**

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## I. DEVOLUTION OVER DEREGULATION, RETRENCHMENT OVER REFORM

Federalism, unbound, dominates American constitutional law. Particularly in matters affecting Congress's power to regulate interstate commerce,<sup>1</sup> to enforce rights guaranteed by the fourteenth amendment,<sup>2</sup> and to subject the states to federal suit,<sup>3</sup> the Supreme Court under Chief Justice William Rehnquist has built a formidable jurisprudence favoring the devolution of power from the federal government to the states.<sup>4</sup> For good or for ill,<sup>5</sup> decentralization dominates today's constitutional *Zeitgeist*.

At the same time, Congress and the federal regulatory agencies have led a "great transformation" of the law of economic regulation.<sup>6</sup> The last two decades have witnessed natural gas wellhead decontrol,<sup>7</sup> two federal schemes for regulating cable television,<sup>8</sup> the displacement of the Interstate Commerce Commission by the Surface Transportation Board,<sup>9</sup> the Energy Policy Act,<sup>10</sup> and substantial progress toward comprehensive deregulation

1. See, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *cf. Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001).

2. See *Morrison*, 529 U.S. at 598; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

3. See, *e.g.*, *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *cf. Alden v. Maine*, 527 U.S. 706 (1999). The earliest of these cases, "*Lopez*, *Seminole Tribe*, and *Boerne* put a triple whammy on congressional authority." Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1722 (2002).

4. See generally, *e.g.*, Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

5. Compare, *e.g.*, John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (defending the Rehnquist Court's agenda as one that advances local control and associational freedom) with, *e.g.*, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002) (accusing the Rehnquist Court of retrenchment on a civil rights tradition established since the 1950s).

6. See generally Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323 (1998).

7. See Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157; FERC Order No. 636, 57 Fed. Reg. 13,267 (April 16, 1992), *aff'd*, United Distrib. Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996).

8. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C.); Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.).

9. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803.

10. Pub. L. No. 102-486, 106 Stat. 2776 (1992) (codified in scattered sections of 16, 25, 26, 30, and 42 U.S.C.).

of the electricity industry.<sup>11</sup> The command-and-control techniques that once typified the law of regulated industries have yielded to “complete detariffing, elimination of all entry restrictions, and [even] outright abolition” of regulatory supervision.<sup>12</sup> In the few remaining “market segments that have natural monopoly characteristics,” a “new set of regulatory obligations including the duty to interconnect, to lease unbundled network elements, and to sell services for resale” will prevent incumbents from using their control of “bottleneck facilities . . . to discriminate against competitors.”<sup>13</sup> The full extent to which the common law and schemes of private ordering will fill the legal vacuum left by this regulatory retreat remains to be seen.<sup>14</sup>

The sheer depth of the academic and popular literature on both of these legal developments testifies to “the preeminence of right-of-center arguments in today’s legal culture.”<sup>15</sup> What has failed to attract notice, however, is the fundamental incompatibility of the devolutionary and deregulatory agendas. The downward redirection of regulatory power toward state and local authorities obstructs many, if not virtually all, of the economic objectives of the deregulatory campaign. Devolution does not destroy regulatory power; it merely diverts it from the federal government to the states. Regulatory power, as it moves downstream, may actually increase its potential for mischief. Regulation at the state-law level will almost assuredly be more protective of local interests.

Conversely, deregulation can and perhaps should proceed without devolution. The transition from command-and-control regulation to market-based alternatives can occur within an entirely federal legal framework, one that actively excludes state law from the legal void created by the retreat from a more comprehensive system of regulation. The law of economic regulation abounds with examples of simultaneous displacement of federal and state authority. Congress, after all, is fully able not only to repeal federal regulatory schemes, but also to declare that a particular market is “best left *unregulated*” by the states.<sup>16</sup> With respect to “the Internet and other interactive computer services,” for example, Congress has declared it “the policy of the United States . . . to preserve the vibrant

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11. See *New York v. FERC*, 535 U.S. 1 (2002). See generally Jim Chen, *Regulatory Education and Its Reform*, 16 YALE J. ON REG. 145 (1999) (reviewing doctrinal developments in the law of regulated industries since the mid-1980s).

12. Kearney & Merrill, *supra* note 6, at 1363.

13. *Id.* at 1364.

14. See Philip J. Weiser, *Regulatory Challenges and Models of Regulation*, 2 J. ON TELECOMM. & HIGH TECH. L. 1 (2003).

15. Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 457 (2003).

16. *Ark. Power Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (emphasis in original); *accord, e.g., Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986).

and competitive free market . . . , unfettered by Federal or State regulation."<sup>17</sup> "Cooperative federalism," far from promoting competitive telecommunications markets, is probably the largest obstacle to the attainment of deregulatory objectives underlying the Telecommunications Act of 1996.<sup>18</sup> Many controversies arising from the implementation of that statute have demonstrated how devolution destroys deregulation. Architects of sound regulatory policy must often choose one principle or the other. This article advocates deregulation.

The usual defenses of federalism fall into three broad categories: diversity in substantive policy, administrative efficiency, and enhanced political participation. Federalism, so it is said, enables "a single courageous State" to "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>19</sup> Diverse state policies, in theory and on balance, yield greater satisfaction among members of the public,<sup>20</sup> at least to the extent they are able to vote with their feet.<sup>21</sup> Finally, the maintenance of distinct federal and state sovereigns supposedly preserves individual freedom: "In the tension between federal and state power lies the promise of liberty."<sup>22</sup> The court that supervised the breakup of the Bell system touted what it perceived as the "obvious conceptual similarity between competition in commerce as the foundation of our economic system and competition in ideas as the basis of our political system."<sup>23</sup> As a matter of positive law, these arguments might not even matter. The Supreme Court has pledged to maintain the Constitution's division of authority between local and central authority "even if one could prove that federalism secured no advantages to anyone."<sup>24</sup>

Federalism provides an extremely shaky foundation for the formulation of sound regulatory policy. Its traditional justifications carry little to no weight in any other industry whose economies of scale, economies of scope, or dependence on technological innovation defies the

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17. 47 U.S.C. § 230(b)(2) (2000) (emphasis added).

18. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18 and 47 U.S.C.)

19. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980) (presenting a formal economic model that disputes Justice Brandeis's "laboratories of democracy" hypothesis).

20. See, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987).

21. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

22. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991); *accord* *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

23. *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 150 n.78 (D.C. Cir. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

24. *New York v. United States*, 505 U.S. 144, 157 (1992).

regulatory reach of any geographically delimited jurisdiction.<sup>25</sup> The contemporary telecommunications industry displays all three of these traits in abundance. A decentralized approach to telecommunications policy is not merely unappealing, but affirmatively debilitating. Diversity is far from a virtue in an industry marked by functional convergence, interoperability, and network efficiencies.<sup>26</sup> In the logical layer of the information-based economy, measures promoting interoperability reduce transition costs and encourage entry.<sup>27</sup> What is true of competitors in private markets is equally true of their regulatory counterparts: “niche strategies are inherently dangerous in markets with strong network externalities.”<sup>28</sup> As the geographic scale of communications markets increases, regulatory subsidiarity—that is, delegation of regulatory authority to the smallest available unit of government<sup>29</sup>—realizes steadily lower efficiency gains. At some point, excessive subsidiarity will inflict actual harm. Gains in political accountability via decentralization bear a stiff cost. The law’s vulnerability to demands for naked wealth transfers reaches its apex when benefits are concentrated and costs are diffuse.<sup>30</sup> Otherwise well-intentioned efforts to

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25. Cf. Daniel A. Farber, *Environmental Federalism in a Global Economy*, 83 VA. L. REV. 1283, 1304-05 (1997) (demonstrating that “[t]he conditions calling for a multilateral environmental regime are quite similar to those calling for a multilateral trade regime,” namely, when local governments lack access to “[o]ptimal fiscal instruments,” when competition in the relevant markets is imperfect, when “[p]ublic choice problems distort local decisions,” and when individual “[j]urisdictions are large enough to affect global prices”). I have advocated “across-the-board globalism” on legal concerns as seemingly divergent as environmental protection, free trade, and regulatory policy. Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 192 (2000).

26. See generally Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479 (1998).

27. See *Lotus v. Borland*, 49 F.3d 807, 821 (1st Cir. 1995), *aff’d without opin.*, 516 U.S. 233 (1996).

28. CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES* 247 (1998).

29. Cf. Treaty Establishing the European Economic Community, art. 5, *signed in Rome*, March 25, 1957, *entered into force*, Jan. 1, 1958 (“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”); CATECHISM OF THE CATHOLIC CHURCH § 1883 (“The teaching of the Church has elaborated the principle of subsidiarity, according to which a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society . . . .” (internal quotation marks and citations omitted)). As to subsidiarity within the law of the European Union, see generally Deborah Z. Cass, *The Word the Saves Maastricht? The Principle of Subsidiarity and the Division of Powers Within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992); A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992).

30. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 17, 23-24 (1991); MICHAEL T. HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 101-02 (1981); DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 239-41 (1989); MANCUR OLSON, *THE LOGIC OF COLLECTIVE*

police competition routinely dissolve into schemes for delivering benefits to well-organized groups at the expense of consumers and other “anonymous and diffuse” majorities.<sup>31</sup> The rent-seeking never stops: even legislation that promises “the end of government intervention” in fact generates “new opportunities to capture decision making rents.”<sup>32</sup>

In light of these contradictions, sustaining one’s hope in cooperative federalism requires a leap of faith akin to the suspension of belief that typifies the Western tradition in American public law. The states west of the hundredth meridian have displayed a remarkable talent for demanding autonomy from the central government while simultaneously insisting that the westward flow of federal largesse continue unabated. If, on one hand, Congress or the federal courts threaten gun ownership or the prior appropriation doctrine in water law, many westerners instantaneously disavow membership in the Union. At the same time, and without a trace of irony or shame, these very individuals protest the imminent destruction of their states’ “equal footing” should federal authorities offer the slightest hint of revoking or even reducing the West’s historic flow of subsidies for reclamation, grazing, forestry, and mining.<sup>33</sup> It is no longer the South but the West that needs Neil Young’s reminder: every state, from Alabama to Wyoming, has “got the rest of the Union to help [it] along.”<sup>34</sup>

Quite appropriately, Colorado leads the nation in articulating the intellectual case for cooperative federalism, a theory that concedes nothing to antitrust as a policy at war with itself.<sup>35</sup> In the keynote speech of this symposium, Raymond Gifford, former chairman of the Colorado Public

ACTION 144-45 (1965). See generally Daniel A. Farber, *Positive Theory as Normative Critique*, 68 S. CAL. L. REV. 1565 (1995).

31. Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985). See generally William F. Shugart II, *Public-Choice Theory and Antitrust Policy*, in CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC CHOICE PERSPECTIVE 7 (Fred S. McChesney & William F. Shugart II eds., 1995) (applying public choice theory to antitrust law).

32. James A. Montanye, *Rent Seeking Never Stops: An Essay on Telecommunications Policy*, 1 INDEP. REV. 249, 277 (1996)

33. At its most pathological, Western secessionism has culminated in the “County Supremacy Movement,” whose signature argument is that title to federal public lands actually resides in local governments. This posture utterly lacks legal merit. See, e.g., *United States v. Volger*, 859 F.2d 638 (9th Cir. 1988); *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996); *United States v. Gardner*, 903 F. Supp. 1394 (D. Nev. 1995). See generally Robert Barrett, Comment, *History on an Equal Footing: Ownership of the Western Federal Lands*, 68 U. COLO. L. REV. 761 (1997); Paul Conable, Comment, *Equal Footing, County Supremacy, and the Western Public Lands*, 26 ENVTL. L. 1263 (1996).

34. NEIL YOUNG, *Alabama, on HARVEST* (Warner Bros. 1972); cf. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and . . . against domestic Violence.”). See generally Jim Chen, *Rock ‘n’ Roll Law School*, 12 CONST. COMMENTARY 315 (1995).

35. See ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

Utilities Commission, places federalism and subsidiarity at the heart of his call for “assertive modesty” in telecommunications regulation.<sup>36</sup> Professor Philip Weiser, director of the Silicon Flatirons Telecommunications Program, has forcefully advocated a prominent interpretive role for state regulators within federal telecommunications law.<sup>37</sup> Finally, Judge Stephen F. Williams of the U.S. Court of Appeals for the D.C. Circuit, who began his career as a member of the University of Colorado law faculty, has established himself as perhaps the foremost judicial authority on the Telecommunications Act. Among his many opinions interpreting this statute, his opinion for the panel in *WorldCom, Inc. v. FCC*,<sup>38</sup> a 2002 case partially upholding Bell Atlantic’s authorization to offer long-distance service to its residential customers in Massachusetts, articulates a strong case for federal deference to state regulatory agencies. Together with Professor Dale Hatfield, former chief technologist for the Federal Communications Commission (FCC), Commissioner Gifford, Professor Weiser, and Judge Williams represent a distinct “Colorado school” in contemporary regulatory thought.

This article will attempt to assess, on an admittedly tentative basis, the success of the Colorado school in resolving the intrinsic contradiction of cooperative federalism. At least this much truth emerges from the work of the Colorado school: regulatory controversies have lain at the crossroads of the decentralization and deregulation agendas of a politically conservative legal culture. An entire generation has come of age since the 1982 case of *FERC v. Mississippi*<sup>39</sup> mortally wounded William Rehnquist’s original effort to revitalize the tenth amendment.<sup>40</sup> In their rush to lavish attention on the constitutional issues raised by the Public Utility Regulatory Policies Act of 1978 (PURPA),<sup>41</sup> most legal scholars neglect to mention that the Supreme Court, one year after *FERC v. Mississippi*, upheld the congressionally mandated cogeneration and small power production rules that transformed PURPA into an engine of technological innovation and economic deconcentration in electricity generation.<sup>42</sup> At the dawn of what

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36. See Raymond Gifford, address at the University of Colorado Symposium on Models of Regulation for the New Economy (Feb. 2, 2003).

37. See Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001).

38. 308 F.3d 1 (D.C. Cir. 2002).

39. *FERC v. Mississippi*, 456 U.S. 742 (1982).

40. See *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). See generally, e.g., Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623 (1994).

41. Public Utilities Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (codified as amended in scattered sections of 15, 16, 30, 42, and 43 U.S.C.).

42. See *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.* 461 U.S. 402 (1983). See generally, e.g., Bernard S. Black & Richard J. Pierce, Jr., *The Choice Between Markets and Central Planning in Regulating the U.S. Electricity Industry*, 93 COLUM. L. REV. 1339, 1348

we now recognize as the great transformation of regulated industries law, a bold federal power grab preceded and enabled deregulation.

PURPA, however, provides at best remote evidence on the relative merits of state-law subsidiarity versus federal supremacy. PURPA's jurisdictional premise that the greater federal power to preempt all state-law regulation of electricity includes the lesser power to issue commands to state public utility commissions<sup>43</sup> is fairly characterized as an "our way or the highway" approach to cooperative federalism.<sup>44</sup> PURPA made no pretense of implementing a regulatory model that the Colorado school would assuredly find more amenable: explicit federal delegation of dispositive decisionmaking authority to the states. Just as important, the coherence of the Colorado school's approach to cooperative federalism ought to be tested against a contemporary regulatory scheme rather than one developed during the presidency of Jimmy Carter. "[R]egulatory measures," after all, "are temporary expedients, not eternal verities."<sup>45</sup>

To test whether a more deferential model of cooperative federalism provides a firm basis for "wager[ing] [regulatory] salvation upon some prophecy based upon imperfect knowledge,"<sup>46</sup> I propose to examine a seemingly obscure provision of the Telecommunications Act of 1996. The Act delegates authority to state public utility commissions to determine a carrier's eligibility to receive support from the federal Universal Service Fund for providing service in rural and high-cost areas.<sup>47</sup> Subsidized rural telephony is admittedly less sexy than the heavily contested disputes over the Total Element Long-Run Incremental Cost (TELRIC) rule, which the FCC uses to determine the prices at which incumbent local exchange carriers (ILECs) must sell unbundled network elements to their competitors,<sup>48</sup> and over open access to cable-based facilities for high-speed

(1993); Jeffrey D. Watkiss & Douglas W. Smith, *The Energy Policy Act of 1992 — A Watershed for Competition in the Wholesale Power Market*, 10 YALE J. ON REG. 447, 453-54 (1993).

43. See *FERC v. Mississippi*, 456 U.S. at 765 (reasoning that because "Congress could have pre-empted the field" of electricity regulation, "PURPA should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* . . . suggested federal standards."); see also *id.* at 765 n.29 ("Certainly, it is a curious type of federalism that encourages Congress to pre-empt a field entirely, when its preference is to let the States retain the primary regulatory role.")

44. See *New York v. United States*, 505 U.S. 144, 167 (1992) (citing, *inter alia*, *FERC v. Mississippi*, 456 U.S. at 764-65, in support of a model of "cooperative federalism" under which Congress "offer[s] States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation").

45. *FPC v. E. Ohio Gas Co.*, 338 U.S. 464, 489 (1950) (Jackson, J., dissenting).

46. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

47. See 47 U.S.C. § 214(e)(1) (2000).

48. See *id.* § 252(d)(1); 47 C.F.R. §§ 51.503, .505 (2002); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 493-97 (2002); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 374 & n.3 (1999); *U.S. Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); Jim Chen, *The Second*



Internet access.<sup>49</sup> Both TELRIC and broadband open access have sparked furious debates over the proper balance between state and federal regulatory authority. For the moment, however, I shall forgo an assessment of cooperative federalism in those high-profile controversies in order to conduct a detailed examination of the universal service program and its special provision regarding rural service. It is precisely those markets where “the average consumer” or the average voter “has no incentive to become informed about [a contested] program, let alone to lobby against it,” that naked wealth transfers from the ignorant many to the well-placed few are likeliest to take place.<sup>50</sup>

Universal service merits special attention because it is one of the few relics of conventional public utility regulation to have survived the “great transformation.” The 1996 Act sought “to limit state rate and entry but not universal service regulation.”<sup>51</sup> Universal service also represents a singularly impressive example of cooperative federalism. “Congress contemplated that the state public utility commissions would continue to play a vital role in the preservation and advancement of universal service . . . .”<sup>52</sup> As with living fossils in nature, however, we should eschew the temptation to assume that universal service as the coelacanth of telecommunications law has survived utterly unchanged.<sup>53</sup> Contemporary universal service especially with its ambitious mandate to extend “advanced” services to schools, libraries, and health-care providers<sup>54</sup> bears little resemblance to

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*Coming of Smyth v. Ames*, 77 TEX. L. REV. 1535, 1541-42 (1999). See generally Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 COLUM. L. REV. 835 (1997) (discussing the legal precursors of the Telecommunications Act, especially regulation under the 1934 Act and the Modified Final Judgment); Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395 (1999).

49. See, e.g., Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327 (2002); AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000); *In re Inquiry Concerning High-Speed Access to Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802, 4832 (2002) (ruling that the provision of high-speed Internet access over cable should be classified as an “information service”); Jim Chen, *The Authority to Regulate Broadband Internet Access over Cable*, 16 BERKELEY TECH. L.J. 677 (2001); Mark A. Lemley & Lawrence Lessig, *Open Access to Cable Modems*, 22 WHITTIER L. REV. 3 (2000).

50. Farber, *supra* note 30, at 1570.

51. Cellular Telecomms. Indus. Ass'n v. FCC, 168 F.3d 1332, 1337 (D.C. Cir. 1999).

52. AT&T Communications of the Pac. Northwest, Inc. v. US West Communications, Inc., 31 F. Supp. 2d 861, 864 (D. Or. 1998).

53. Cf. DAVID M. RAUP, EXTINCTION: BAD GENES OR BAD LUCK? 41-42 (1991) (disputing the assumption that “living fossils” such as the coelacanth have somehow “survived unchanged for hundreds of millions of years” or “have ever evolved an immunity to extinction”).

54. See 47 U.S.C. § 254(b)(2), (6) (2000); Angela J. Campbell, *Universal Service Provisions: The “Ugly Duckling” of the 1996 Act*, 29 CONN. L. REV. 187, 203 (1996); Jim Chen, *Standing in the Shadows of Giants: The Role of Intergenerational Equity in Telecommunications Reform*, 71 U. COLO. L. REV. 921, 940 (2000); Jerry Hausman & Howard Shelanski, *Economic Welfare and Telecommunications Regulation: The E-Rate Policy for Universal-Service Subsidies*, 16 YALE J. ON REG. 19, 21 (1999) (describing the FCC's “e-rate”

traditional schemes focused on extending lifeline rates to low-income customers. Unlike PURPA, the Telecommunications Act invites the states to exercise independent (albeit not unconstrained) judgment in administering the federal universal service program. Within its own terms and as an example of cooperative federalism, universal service under the 1996 Act reflects evolution in telecommunications law.

Rural telephony is at once distinctly global and uniquely American.<sup>55</sup> It is global in the sense that no other segment of the American telecommunications market more closely resembles the physical and economic conditions faced by carriers seeking to extend service to markets not already saturated with multiple layers of communications infrastructure. "Emerging" markets abroad look very similar to rural markets at home. Rural telephony is also uniquely American insofar as the United States contains far more "vast obscurity beyond [its] cit[ies]" and far fewer citizens in "the dark fields of the republic roll[ing] on under the night" than most other developed countries.<sup>56</sup> America has much more elbow room relative to Europe and Japan.<sup>57</sup> Yet wireless telephony remains the exception rather than the rule in the United States. Other countries, regardless of their population density or level of economic development, have more warmly embraced wireless platforms. In the most negative sense, America alone remains a "wired nation."<sup>58</sup> Even more surprisingly, rural Americans still lag behind their urban counterparts in adopting wireless telephone service. These anomalies enhance the value of examining the rural subsidy program as an exercise in cooperative federalism.

The balance of this article will examine the administration of the federal universal service program for rural and high-cost areas. Part II outlines this program and the cooperative scheme of joint federal and state

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program as "the Commission's most visible regulatory action . . . pursuant to" the Telecommunications Act's "universal-service mandates").

55. See Jon Nuechterlein, *Incentives to Speak Honestly About Incentives: The Need for Structural Reform on the Local Competition Debate*, 2 J. ON TELECOMM. & HIGH TECH. L. 399 (2003).

56. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 141 (Matthew J. Bruccoli ed., 1991) (1st ed. 1925).

57. Based on population figures for 1997, the population density of the European Union was 115 inhabitants per square kilometer, almost four times the United States' population density of 29 inhabitants/km<sup>2</sup>. At the same time, 134 million hectares were under cultivation in European Union, less than a third of the 425 million hectares cultivated in the United States. See EUROPEAN COMM'N, *THE AGRICULTURAL SITUATION IN THE EUROPEAN UNION: 1998 REPORT*, at T/23-T/24 (1999). The recent accession of new member-states to the European Union, especially Poland, Hungary, and the Czech Republic, changes the balance between urban and rural population within the European Union, but not enough to unseat the United States' position as the developed world's third most sparsely populated nation (after Australia and Canada).

58. The slogan, "The Wired Nation," originated in Ralph Smith's report on cable television as an economically viable alternative to conventional broadcast television. See RALPH L. SMITH, *THE WIRED NATION* (1972); Ralph L. Smith, *The Wired Nation*, 210 NATION 582 (1970).

regulation on which it rests. Some disputes over the requirements imposed by the universal service program—among others, the definition of “local usage,” the propriety of a “wireline equivalence” rule for wireless carriers, and the requirement that a subsidized carrier advertise its services—have challenged the ability of state regulators to administer the program without discriminatory regard to carriers’ incumbency status *vel non* or their technological platforms.

Part III examines in depth the most important task performed by state regulators in the administration of the rural and high-cost support program: determination of the public interest to be served by competitive entry into these markets. After describing the centrality of competitive neutrality and consumer choice to this analysis, I shall argue that states must resist the temptation to inject an affirmatively unlawful factor—namely, the impact of competitive entry on the solvency of the Universal Service Fund—into their assessments of the public interest.

Part IV explores an issue raised by the regulatory mandate of technological neutrality. Most competitive telecommunications carriers in rural areas deploy wireless infrastructure in whole or in part. A provision of the Communications Act predating the 1996 overhaul preempts state-law regulation of rates or entry in the market for commercial mobile radio services. I shall explain how this provision affects state administration of the rural and high-cost support program.

Part V concludes that federal mechanisms for subsidizing rural telephony demonstrate the irreconcilable conflict between decentralization and deregulation. Raymond Gifford’s proposal for “assertive modesty” contains an intrinsic limit on the reach of presumptive deference to state regulatory commissions.<sup>59</sup> Insofar as state regulators are not prepared to complete the transition from traditional public utility regulation to the legal models of the “great transformation,” Chairman Gifford would accord state regulators no deference. This case study takes Chairman Gifford’s proposition one step further: there should be no deference whatsoever to interpretations of law and other exercises of discretion undertaken by state regulators charged with implementing specific aspects of federal telecommunications law.

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59. See Gifford, *supra* note 36.

## II. THE RURAL AND HIGH-COST COMPONENT OF THE FEDERAL UNIVERSAL SERVICE PROGRAM

### A. Core Statutory Provisions and Other Sources of Law

The Telecommunications Act of 1996 promised to “promote competition and reduce regulation,” “secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies.”<sup>60</sup> Numerous provisions of the Act instruct the FCC, with varying degrees of specificity, “to promote . . . policies and purposes . . . favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.”<sup>61</sup> The legislative history of the Act confirms Congress’s intent “to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”<sup>62</sup>

The Act’s universal service provisions are no exception to this procompetitive legislative package. Together with the FCC’s rules on interconnection and unbundled access (of which the TELRIC rule is the most celebrated component)<sup>63</sup> and on access charge reform,<sup>64</sup> the FCC’s initial report and order on universal service<sup>65</sup> headlined a “competition trilogy” of rules on local telephone reform<sup>66</sup> that was immodestly but not inaccurately heralded as “the most pro-competitive action of government since the break-up of the Standard Oil Trust.”<sup>67</sup> Because comprehensive regulatory reform and the opening of local telephone markets threatened to

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60. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 15, 18 and 47 U.S.C.) (preamble).

61. 47 U.S.C. § 257(b) (2000).

62. H.R. CONF. REP. NO. 104-488, at 113 (1996).

63. See Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, 11 F.C.C.R. 15,499 (1996), *aff’d in part, rev’d in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

64. See Access Charge Reform, 7 Communications Reg. (P&F) 1209 (Fed. Communications Comm’n 1997), *aff’d sub nom.* Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998); Access Charge Reform Price Cap Performance Review for Local Exch. Carriers, 11 F.C.C.R. 21,354 (1996).

65. Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776 (1997) [hereinafter *First Report & Order*], *aff’d in part, rev’d in part sub nom.* Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999) *cert. denied*, 530 U.S. 1210, 1223 (2000) *and cert. dismissed*, 531 U.S. 975 (2000).

66. See generally Gregory L. Rosston, *The 1996 Telecommunications Act Trilogy*, 5 MEDIA L. & POL’Y 1, (Winter 1996).

67. *Implementation of the Local Competition Provisions*, 11. F.C.C.R. at 16,239 (separate statement of Chairman Hundt).

undermine the traditional system of implicit subsidies, the 1996 Act integrated a new universal service mechanism into its market-opening provisions.<sup>68</sup>

In considering and ultimately passing the Telecommunications Act, Congress expressed its understanding that traditional mechanisms “for universal service are uniquely suited for a regulated market where limits on competition guarantee economic returns that are sufficient . . . to allow firms to subsidize their own high-cost consumers.”<sup>69</sup> The legislative history of the Act evinces congressional sensitivity to the erosion of “near-guaranteed returns” under deregulation and to the need for coordinating universal service support with “an orderly transition from a regulated market to a competitive and deregulated market.”<sup>70</sup> Congress could not have been clearer in linking the preservation of universal service with its desire to promote “competition for local telephone service by cable, wireless, long distance, and satellite companies, and electric utilities, as well as other entities.”<sup>71</sup>

The 1996 Act established a Federal-State Joint Board on universal service.<sup>72</sup> Universal service support must “be explicit and sufficient to achieve the purposes of” the 1996 Act.<sup>73</sup> The requirement of “explicit” subsidies has rendered all implicit subsidies illegal.<sup>74</sup> Congress adopted the principle “that any support mechanisms continued or created under” the new statute “should be explicit, rather than implicit as many support mechanisms” had been.<sup>75</sup> The 1996 reform represented “a great improvement because it move[d] the scheme for Universal Service out from between the lines of the incumbents’ rate structures and place[d] it in the light of day.”<sup>76</sup> In order to receive federal universal service support, a carrier

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68. See *Tex. Office of Pub. Util. Counsel*, 183 F.3d at 406; *Tekstar Communications, Inc.*, Docket No. P-5542/M-01-1865, slip op. at 2 (Minn. Pub. Utils. Comm’n, May 28, 2002).

69. H.R. REP. NO. 104-204, at 68 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 33.

70. *Id.*

71. S. REP. NO. 104-23, at 5 (1995).

72. See 47 U.S.C. § 254(a) (2000).

73. *Id.* § 254(e).

74. See *Comsat Corp. v. FCC*, 250 F.3d 931, 938 (5th Cir. 2001). See also *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 623 (5th Cir. 2000); *TOPUC*, 183 F.3d at 425; *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 537-38 (8th Cir. 1998).

75. H.R. CONF. REP. NO. 104-458, at 131 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 142.

76. John W. Berresford, *The Future of the FCC: Promote Competition, Then Relax*, 50 ADMIN. L. REV. 731, 761 (1998); *cf. Qwest Corp. v. FCC*, 258 F.3d 1191, 1196 (10th Cir. 2001) (acknowledging how universal service before 1996 was accomplished through “a combination of explicit monetary payments to local phone companies and implicit subsidies through rate designs,” especially the imposition of “uniform rates throughout a company’s service area, which enabled the company to charge above-cost rates in urban areas to support below-cost rates in rural areas”); Multi-Ass’n Group (MAG) Plan for Regulation of Interstate Servs. of Non-Price Cap Incumbent Local Exch. Carriers & Interexchange Carriers, 16 F.C.C.R. 11,244, 11,363 (2001) (separate statement of Ness, Comm’r) (noting the “critical role” that “State

must be designated as an eligible telecommunications carrier (ETC).<sup>77</sup> An ETC must “offer the services that are supported by Federal universal service support mechanisms.”<sup>78</sup> It must do so “using its own facilities or a combination of its own facilities and resale of another carrier’s services.”<sup>79</sup> Moreover, the would-be ETC must “advertise the availability of such services and the charges therefor using media of general distribution.”<sup>80</sup>

The 1996 Act delegates to the states the task of “designat[ing] a common carrier that meets the[se] requirements . . . as an eligible telecommunications carrier.”<sup>81</sup> The designation of ETCs in rural markets requires an additional step. In markets subject to the jurisdiction of a state regulatory commission, each “State commission *may*, in the case of an area served by a rural telephone company, and *shall*, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier . . . so long as each additional requesting carrier meets the requirements” set out in 47 U.S.C. § 214(e)(1).<sup>82</sup> “Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.”<sup>83</sup> “In the case of a common carrier . . . not subject to the jurisdiction of a State commission,” the Federal Communications Commission performs an identical public interest inquiry in lieu of its state-law counterpart.<sup>84</sup>

In concert, these statutory provisions set forth four distinct requirements for a carrier seeking ETC designation:

1. The carrier must “offer the services that are supported by Federal universal support mechanisms.”<sup>85</sup>
2. The carrier must use either “its own facilities or a combination of its own facilities and resale of another carrier’s services.”<sup>86</sup>
3. The carrier must “advertise the availability of such services and the charges therefor using media of general distribution.”<sup>87</sup>

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commissions . . . play in ensuring that subsidies implicit in intrastate rates are made explicit”) [hereinafter *MAG Plan Order*].

77. See 47 U.S.C. §§ 214(e)(1), 254(e) (2000).

78. *Id.* § 214(e)(1)(A).

79. *Id.*

80. *Id.* § 214(e)(1)(B).

81. *Id.* § 214(e)(2).

82. *Id.* (emphases added).

83. *Id.*

84. *Id.* § 214(e)(6); see also Procedure for Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, 63 Fed. Reg. 162 (Jan. 5, 1998).

85. 47 U.S.C. § 214(e)(1)(A) (2000).

86. *Id.*

87. *Id.* § 214(e)(1)(b)

4. Designation of the carrier as an ETC must be “consistent with the public interest, convenience, and necessity.” Where the service area at issue belongs to “a rural telephone company,” the relevant state commission must explicitly “find that the designation is in the public interest.”<sup>88</sup>

Determining whether a carrier satisfies the first of these conditions requires an examination of the FCC’s regulations. In section 54.101(a) of its rules, the FCC has set forth nine supported services that an ETC must offer: (1) voice grade access to the public switched network, (2) local usage, (3) dual tone multi-frequency signaling or its functional equivalent, (4) single-party service or its functional equivalent, (5) access to emergency services, (6) access to operator services, (7) access to interexchange service, (8) access to directory service, and (9) toll limitation for qualifying low-income consumers.<sup>89</sup>

Among the four broad prerequisites for ETC designation, only the second typically escapes serious controversy. The statute quite plainly withdraws the welcome mat from pure resellers of local carriage, and such firms never seek ETC status. In rural markets, the ILEC will capture the first ETC designation for its service area. As a result, a competitive carrier cannot become the second or subsequent ETC in a rural area until a state commission (or, if a state has forsworn jurisdiction, the FCC) finds that each additional ETC designation serves the public interest. Satisfying the section 54.101(a) checklist and the 1996 Act’s advertising requirement can also become legal bottlenecks in a competitive carrier’s pursuit of ETC status. So sharp is the distinction that competitive carriers that succeed in securing ETC designation deserve a title of their own: competitive eligible telecommunications carrier, or CETC.

These complex legal provisions have given rise to numerous controversies over the administration of the federal Universal Service Fund. The ability of incumbents to transform the ETC designation process into a weapon against competition demands that courts and regulators take special care to uphold the procompetitive, deregulatory, and innovation-inducing purposes of the 1996 Act. Lest misinterpretation of the law facilitate rampant discrimination against competitive wireless carriers, policymakers must master difficult statutory terms such as the “public interest” and other pivotal legal concepts. Full understanding of the ETC designation process and its contribution to the preservation and advancement of universal service demands mastery of no fewer than six distinct sources of binding legal standards.

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88. *Id.* §214(e)(2)

89. 47 C.F.R. § 54.101(a) (2002); *see also* 47 U.S.C. §§ 214(e)(1), 254(c) (2000).

First, 47 U.S.C. § 214(e) establishes basic eligibility criteria for all carriers seeking federal universal service support. Section 214(e) prescribes the same substantive criteria for all ETC petitions regardless of whether they are approved by the Federal Communications Commission or by state commissions.

Statutory origins are especially critical in the application of the second and perhaps this setting's most important legal standard: the "public interest" in designating more than one ETC in a rural market. Far from being an open-ended mandate for unbounded administrative decisionmaking, the public interest standard draws its meaning from the statutory provisions that govern the federal universal service program.

Third, the FCC's interpretations of the 1996 Act and other statutory provisions governing the universal service program constitute a source of binding legal standards in their own right. In particular, the FCC's reasonable interpretations of the term "public interest" (which, it bears repeating, is statutory in origin) merit judicial deference.<sup>90</sup>

Three additional sources of law apply with special force to ETC designations by state commissions. In reviewing the FCC's *First Report and Order* on universal service, the United States Court of Appeals for the Fifth Circuit held that the Commission could not categorically "prohibit[] the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support."<sup>91</sup> The Fifth Circuit nevertheless recognized at least one limitation on the regulatory discretion of state commissions. "[E]ligibility requirements" that are so "onerous . . . that no otherwise eligible carrier could receive designation . . . would probably run afoul of § 214(e)(2)'s mandate to 'designate' carriers eligible for federal universal service support."<sup>92</sup> Insofar as section 214(e)(6) imposes an identical "mandate to 'designate' carriers" in proceedings falling within exclusive federal jurisdiction, the same limitation constrains the discretion of the FCC.

Preemption under the 1996 Act supplies two final sources of law. Section 253(a) of the Act preempts state-law provisions that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>93</sup> Finally, the preemptive power of 47 U.S.C. § 332 deprives the states and their local subdivisions of "authority to regulate the entry of or the rates charged by any commercial mobile service."<sup>94</sup> Section 332 thus preempts state-law that

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90. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1267 (10th Cir. 2000).

91. *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 (5th Cir. 1999).

92. *Id.* at 418 n.31.

93. 47 U.S.C. § 253(a) (2000).

94. *Id.* § 332(c)(3)(A).



might otherwise burden prospective ETCs that would deliver federally supported services over wireless facilities regulated under federal law as commercial mobile radio service.

The remainder of Part II will explore disputes over the section 54.101(a) checklist and the advertising requirement. State commissions' determination of the public interest before designating a CETC is a highly contentious issue that warrants in-depth consideration in its own right. I shall defer that issue until Part III.

### *B. "Local Usage" and Service Area Definition*

Local usage has not only a geographic dimension, but also a temporal one. The applicable FCC regulation defines "local usage" as "an amount of minutes of use of exchange service, . . . provided free of charge to end users."<sup>95</sup> What the regulation implies and what it states explicitly are both important. First, the FCC's definition of local usage does not define "local" in geographic terms, much less by reference to an incumbent local exchange carrier's service area. Second, the regulation quite plainly contemplates that local usage may be provided as a finite number of minutes per billing period. A requirement of unlimited local usage would be incompatible with the FCC's definition of local usage.

An understanding of the local usage requirement begins with service area definition. Fundamental physical differences between wireline and wireless platforms frequently, perhaps invariably, require regulators to refine existing definitions of the area in which a subsidized carrier will offer local usage. Under the 1996 Act, the "term 'service area' means a geographic area established by a State commission . . . for the purpose of determining universal service obligations and support mechanisms."<sup>96</sup> "In the case of an area served by a rural telephone company, 'service area' [presumptively] means such company's 'study area' . . ."<sup>97</sup> A CETC's proposed service area should be approved unless its proposed redefinition constitutes an attempt to cream-skim, inflicts significant additional administrative burdens, or obstructs the regulation of rural LECs during the transition from universal service support based on embedded costs to a strictly forward-looking basis for high-cost support.<sup>98</sup> Indeed, the FCC actively "encourage[s] states to consider disaggregating a non-contiguous service area of a rural telephone company into service areas composed of the contiguous portions of that area because some wireless carriers may be unable to provide service in non-

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95. 47 C.F.R. § 54.101(a)(2) (2002).

96. 47 U.S.C. § 214(e)(5) (2000).

97. *Id.*

98. See Fed.-State Joint Bd. On Universal Serv., 12 F.C.C.R. 87, 178-79 (1996).

contiguous service areas.”<sup>99</sup> Refusal by a state commission to cooperate with service area redefinition has the potential to raise a formidable barrier to competition. Requiring carriers “to serve a non-contiguous service area as a prerequisite to eligibility” ranks high among approaches to service area definition that would have a “particularly harmful” effect on “competition in rural areas” by “imposing additional burdens on wireless entrants.”<sup>100</sup>

Although the FCC does require some minimum amount of local usage,<sup>101</sup> the Commission has never specified the precise number of minutes that a carrier must offer.<sup>102</sup> The Commission has, however, granted ETC status to wireless carriers that offer “varying amounts of local usage in [their] monthly service plans”<sup>103</sup> or provide at least one “rate plan that includes unlimited local usage” among a range of “several service options [that] includ[e] varying amounts of local usage. . .”<sup>104</sup>

The Telecommunications Act forbids a state commission from requiring unlimited local usage as a condition of designating an eligible telecommunications carrier. In its July 2002 recommendation to the FCC, the Federal-State Joint Board on Universal Service specifically rejected a proposal to add unlimited local usage to the list of services supported by the USF.<sup>105</sup> The Joint Board specifically wished to leave states and carriers the option of using metered pricing of local usage to encourage low-income and low-volume consumers to subscribe to telecommunications service.<sup>106</sup> The Board also recognized that a requirement of unlimited local usage would violate the federal principle of competitive neutrality among telecommunications carriers “by undercutting competition and reducing consumer choice.”<sup>107</sup> The Board and the FCC have long recognized that requiring “a very high level of local usage” let alone unlimited calling “would give a competitive advantage to wireline carriers.”<sup>108</sup> A “measured use” plan, on the other hand, would satisfy the local usage requirement. Unlike an unlimited calling plan, a “metered” or “measured use” plan provides the customer a limited number of minutes of calling per billing

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99. *First Report & Order*, *supra* note 65, at 8792.

100. *Id.* at 8882-83.

101. *See id.* at 8813.

102. *Cf. id.* at 8812 (reserving to the FCC the responsibility for determining the minimum number of minutes required for “local usage” for purposes of federal universal service support, while permitting states to determine the minimum number of minutes required for purposes of universal service mechanisms funded and operated by the states).

103. *W. Wireless Corp.*, 16 F.C.C.R. 48, 52 (2000).

104. *Pine Belt Cellular, Inc. & Pine Belt PCS, Inc.*, 17 F.C.C.R. 9589, 9593 (2002).

105. *See Fed.-State Joint Bd. on Universal Serv.*, 17 F.C.C.R. 14,095, 14,113-14 (2002).

106. *See id.* at 14,113.

107. *Id.* at 14,113-14.

108. *Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 21,252, 21,279 (1998); *see also First Report & Order*, *supra* note 65, at 8814.

period, typically with an option to purchase additional minutes at a predetermined rate.

The experience of the Minnesota Public Utilities Commission (MPUC) is illustrative. The MPUC has never defined local usage in terms of unlimited calling. Rather, that commission has acknowledged that a competitive carrier may satisfy the requirement of “local usage” by offering an unlimited number of minutes in a local calling area roughly equivalent to the ILEC’s local calling area.<sup>109</sup> The MPUC has also ruled that a carrier that offers at least one service offering that includes an unlimited number of minutes clearly satisfies the federal requirements of “local usage.”<sup>110</sup> ETCs in Minnesota are receiving federal universal service support for measured-use lines.<sup>111</sup> For example, the MPUC has certified that CenturyTel of Minnesota is an ETC receiving federal USF support for services identified in the section 54.101(a) checklist, including local usage.<sup>112</sup> Minnesota law therefore comports with the FCC’s view that an ETC may satisfy the obligation to provide local usage by including “a variety of local usage plans” within its overall “universal service offering.”<sup>113</sup>

### *C. Service Quality Plans, “Wireline Equivalence,” and Carrier of Last Resort Obligations*

Federal law bars a state commission from imposing a service quality plan, especially one that mirrors an incumbent carrier’s offerings. In its initial examination of the 1996 Act’s universal service mandate, the Federal-State Joint Board specifically addressed and soundly rejected a proposal to require competitive ETCs to develop and submit service quality plans as a condition of certification: “We are unpersuaded . . . that the Commission should institute specific standards to ensure that competitors provide the same quality service as the incumbent.”<sup>114</sup> Instead, the Board “agree[d] . . . that competition should ultimately give carriers the incentive to provide quality services by allowing consumers to choose among various telecommunications providers.”<sup>115</sup> In its *First Report & Order* on universal service, the FCC adopted the Board’s recommendation “against the

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109. See *Minn. Cellular Corp.*, Docket No. P-5695/M-98-1285, slip op. at 8-10, 1999 WL 1455080, at \*7-8 (Minn. Pub. Utils. Comm’n, Oct. 27, 1999).

110. See *WWC Holding Co.*, Docket No. P-5695/M-98-1285, slip op. at 3, 2000 WL 668286 at \*2 (Minn. Pub. Utils. Comm’n, April 19, 2000).

111. See, e.g., *CenturyTel of Minn., Inc.*, Exchange Services Tariff § 5.2.1, at 18 (issued Nov. 22, 2002; effective Jan. 26, 2003), available at <http://www.centurytel.com/Services/Tariffs/minnesota/minnloc.pdf>, at 94.

112. See *Fed. Universal Serv. Support*, Docket No. P-999/M-01-1219, 2001 WL 1658767, at \*4 (Minn. Pub. Utils. Comm’n, Oct. 9, 2001).

113. *Cellular S. License, Inc.*, 17 F.C.C.R. 24,393, 24,400 (2002).

114. *Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87, 141 (1996).

115. *Id.* at 140-41.

establishment of federal technical standards as a condition to receiving universal service support.”<sup>116</sup>

Considerations of this sort underlie the FCC’s insistence that “a telecommunications carrier’s inability to demonstrate that it can provide ubiquitous service at the time of its request for designation as an ETC should *not* preclude its designation as an ETC.”<sup>117</sup> At a minimum, therefore, requiring compliance with a service quality plan would violate the universal service principle of competitive neutrality. More pointedly, such a state-law condition on ETC designation violates section 253. This provision of the 1996 Act bans any “State or local regulation, or other State or local legal requirement, [that] prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>118</sup> Section 253 specifically conditions “the ability of a State to impose . . . requirements necessary to preserve and advance universal service” on the state’s compliance with the principle that such requirements be set forth and applied “on a competitively neutral basis.”<sup>119</sup>

Anticipating state commissions’ ability to manipulate ETC petitions by competitive carriers for anticompetitive purposes, the FCC has acted upon Congress’s command to “preempt the enforcement of [any] statute, regulation, or legal requirement” that violates the federal mandate to remove barriers to entry into local and interstate telecommunications markets.<sup>120</sup> For instance, when the South Dakota Public Utilities Commission demanded that a carrier provide supported services throughout a service area before being designated as an ETC, the FCC preempted that state-law condition.<sup>121</sup> The FCC unequivocally declared that a state-law provision which effectively “require[s] the provision of service . . . prior to ETC designation” unlawfully “prohibits or has the effect of prohibiting the ability of competitive carriers to provide telecommunications service.”<sup>122</sup>

For its part, the North Dakota Public Service Commission has reasoned that a “requirement to be providing the required universal services to 100% of a service area before receiving designation as an ETC could be so onerous as to prevent any other carrier from receiving the ETC

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116. *First Report & Order*, 12 F.C.C.R. 8776, 8831 (1997).

117. *W. Wireless Corp. Pet. for Preemption of an Order of the S.D. Pub. Utils. Comm’n*, 15 F.C.C.R. 15,168, 15,175 (2000) (emphasis added) [hereinafter *S.D. Preemption Order*]; *accord Cellular South*, 17 F.C.C.R. at 24,399; *RCC Holdings, Inc.*, 17 F.C.C.R. 23,532, 23,538 (2002).

118. 47 U.S.C. § 253(a) (2000). *See generally S.D. Preemption Order*, *supra* note 117, at 15,172-81 (analyzing federal preemption of anticompetitive regulations under state or local law).

119. 47 U.S.C. § 253(b) (2000).

120. *Id.* § 253(d).

121. *See S.D. Preemption Order*, *supra* note 117, at 15,173.

122. *Id.* at 15,169 (citing 47 U.S.C. § 253(a)).

designation in any service area,” going so far as to “require the Commission to rescind the ETC designation already given to North Dakota ILECs.”<sup>123</sup> The North Dakota commission’s conclusion sheds light on the meaning of the Fifth Circuit’s decision, which upheld significant portions of the FCC’s *First Report & Order* on universal service.<sup>124</sup> Although the Fifth Circuit did hold that the FCC “erred in prohibiting the states from imposing additional eligibility requirements on carriers otherwise eligible to receive federal universal service support,”<sup>125</sup> that court also acknowledged that “eligibility requirements” that are so “onerous . . . that no otherwise eligible carrier could receive designation . . . would probably run afoul of § 214(e)(2)’s mandate to ‘designate’ carriers eligible for federal universal service support.”<sup>126</sup> In light of the Fifth Circuit’s decision, the North Dakota commission’s ruling demonstrates that federal law precludes state commissions from conditioning the designation of a wireless carrier as an ETC upon satisfaction of wireline-oriented service quality standards.

For similar reasons, the Joint Board and the FCC have refused to require CETCs to fulfill carrier of last resort (COLR) obligations. The Joint Board rebuffed the suggestion “that the Commission should require competing telecommunications carriers to meet all the obligations imposed by the state on the incumbent LEC, such as COLR requirements or rate regulation . . . to prevent unfair treatment of incumbent LECs.”<sup>127</sup> Instead, the Board “conclud[ed] that establishing specific federal rules or guidelines that would impose symmetrical regulatory obligations on all carriers receiving universal service support are unnecessary to protect the incumbent and would chill competitive entry into high-cost areas.”<sup>128</sup> The FCC squarely rejected the suggestion that it “subject all eligible carriers to the regulatory requirements that govern ILECs, including pricing, marketing, service provisioning, and service quality requirements, *as well as carrier of last resort (COLR) obligations.*”<sup>129</sup> Every tribunal that has considered the issue since the *First Report & Order* has come to the same conclusion.<sup>130</sup> COLR and tariffing obligations therefore meet the same fate as service quality plans’ illegality as a matter of federal law.

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123. W. Wireless Corp. Designated Eligible Carrier Application, Case No. PU-1564-98-428, at ¶ 36 (N.D. Pub. Serv. Comm’n, Dec. 15, 1999); *accord S.D. Preemption Order, supra* note 117, at 15,174 & n.31.

124. *See* Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999).

125. *Id.* at 418.

126. *Id.* at 418 n.31.

127. Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 87, 169 (1996).

128. *Id.*

129. *First Report & Order, supra* note 65, at 8856 (emphasis added).

130. *See* Application of Smith Bagley, Inc., Docket No. T-02556A-99-0207, Decision No. 63269, *Order* (Ariz. Corp. Comm’n, Dec. 15, 2000); Smith Bagley, Inc., Util. Case No. 3026 (N.M. Pub. Reg. Comm’n, Aug. 14, 2001); Petition of RCC Minn., Inc. for Designation as an ETC, Docket No. UT-023033 (Wash. Util. & Transp. Comm’n, Aug. 14, 2002).

Although the FCC may authorize a state commission to designate an ETC for unserved areas,<sup>131</sup> it must do so in a manner that enables a state commission to determine which carrier would be able to provide the specifically requested service most efficiently and then provide the prospective carrier an opportunity to be heard. A proceeding of this nature, of course, can take place only after a request for service has been made.

These legal verities undermine incumbent carriers' frequent demand that state regulators impose conditions beyond the already extensive demands of the federal universal service program in order to create parity with respect to regulatory burdens and benefits as between incumbent and competitive carriers. "Congress appears to have contemplated" the arrangement that incumbent carriers decry: the federal universal service program does indeed permit the situation in which one carrier "wants to be designated as an ETC for an area already being served by a rural telephone company, which is presumably [being] regulated by the state."<sup>132</sup>

Indeed, an appropriate view of regulatory symmetry under the federal universal service program demands that the FCC and state commissions alike eschew prerequisites to ETC designation. An "incumbent LEC is required to make service available to all consumers upon request," but the incumbent can acquire and retain its ETC status even though it "may not have facilities to every possible consumer."<sup>133</sup> True to its belief that "the ETC requirements should be no different for carriers that are not incumbent LECs," the FCC has taken a consistent stand against service quality plans, COLR obligations, and tariff filing as prerequisites to ETC status.<sup>134</sup> The FCC has stated the matter as plainly as possible: "a new entrant can make a reasonable demonstration . . . of its capability and commitment to provide universal service without the actual provision of the proposed service."<sup>135</sup>

#### D. Advertising

Advertising presents another point of potential controversy in the administration of the universal service program. The Telecommunications Act requires that a "common carrier designated as an eligible telecommunications carrier . . . shall, throughout the service area for which the designation is received . . . advertise the availability of such services and the charges therefore using media of general distribution."<sup>136</sup> Again,

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131. See 47 U.S.C. § 214(e) (2000); 47 C.F.R. 54.203 (2002).

132. *W. Wireless Corp.*, 16 F.C.C.R. 18,145, 18,153 (2001).

133. *S.D. Preemption Order*, *supra* note 117, at 15,174.

134. *Id.* at 15,174-75.

135. *Id.* at 15,178; *accord* Cellular S. License, Inc., 17 F.C.C.R. 24,393, 24,399 (2002); RCC Holdings, Inc. 17 F.C.C.R. 23,532, 23,538 (2002).

136. 47 U.S.C. § 214(e)(1)(B) (2000).

Minnesota's experience illustrates the anticompetitive potential inherent in state implementation of federal law. The Minnesota Public Utilities Commission has acknowledged that designation of an ETC must *precede* any legal "obligation to offer and advertise . . . services" supported by the federal USF.<sup>137</sup> A contrary rule requiring a carrier to advertise its services *before* designation as an ETC would be "inherently anti-competitive."<sup>138</sup> "[R]equiring [CETCs] to serve [or advertise] without providing the subsidies that make that service possible . . . would, for all practical purposes, give incumbents a lock on serving high-cost areas . . ."<sup>139</sup> Nor is it self-evident that regulators can effectively prescribe "specific, uniform methods by which [all] eligible telecommunications carriers" must advertise their services, for "a method that is reasonably designed to reach . . . subscribers in one location may not be effective in reaching . . . subscribers in another location."<sup>140</sup>

Cognizant of the anticompetitive potential latent in burdensome advertising requirements, the FCC has explicitly refused to impose advertising requirements and other "eligibility criteria beyond those set forth in section 214(e)."<sup>141</sup> For this reason, the Commission has construed the obligation to advertise the Lifeline and Link Up support programs for qualifying low-income consumers<sup>142</sup> as a legal requirement binding only those carriers that have already been designated as ETCs.<sup>143</sup> It is the act of designating a new ETC, and not the imposition of anticompetitive advertising requirements, that "increases the likelihood that qualified low-income subscribers have a choice of service providers."<sup>144</sup> The FCC has understood that the 1996 Act's advertising mandate, especially when coupled with the requirement that all ETCs be "common carriers,"<sup>145</sup> reinforces legal safeguards against the abuse of universal service funding to engage in "cherry-picking" or "cream-skimming" for low-cost, high-profit

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137. Minn. Cellular Corp., 1999 WL 1455080, at \*5 (Minn. Pub. Utils. Comm'n, Oct. 27, 1999).

138. *Id.*, at \*6.

139. *Id.*

140. Promoting Deployment & Subscribership in Unserved & Underserved Areas, Including Tribal & Insular Areas, 15 F.C.C.R. 12,208, 12,250 (2000) [hereinafter *Promoting Deployment & Subscribership*].

141. Cellco P'ship d/b/a Bell Atl. Mobile, 16 F.C.C.R. 39, 43-44 (2000) [hereinafter *Cellco*].

142. See 47 C.F.R. § 54.405(b) (2002) (Lifeline); *id.* § 54.411(d) (Link Up). See generally *Promoting Deployment & Subscribership*, 15 F.C.C.R. at 12,248-51.

143. See Cellular S. License, Inc., 17 F.C.C.R. 24,393, 24,401 (2002) (declining to require a carrier "to publicize Lifeline and Linkup [*sic*] until it is designated as an ETC").

144. *Cellco*, 16 F.C.C.R. at 44.

145. See 47 U.S.C. § 214(e)(1) (2000).

customers.<sup>146</sup> Thanks to the effectiveness of independent legal safeguards against ETCs' misuse of universal service funds to cross-subsidize nonsupported activities, federal and state regulators can (and should) forgo potentially anticompetitive requirements such as the forced unbundling of CETC service offerings<sup>147</sup> and the demand that each ETC offer "at least one 'stripped down' telecommunications package."<sup>148</sup> Finally, "given that ETCs receive universal service support only to the extent that they serve customers," they have "strong economic incentives . . . , in addition to the statutory obligation, to advertise the universal service offering" without further regulatory prompting.<sup>149</sup>

Federal law prohibits a state commission from requiring a carrier to advertise USF-supported services in advance of and as a condition of ETC designation. According to the Telecommunications Act, "[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."<sup>150</sup> Like an unlimited local usage rule, an advance advertising rule would seriously impair the operation of the federal universal service program.

### III. DETERMINING THE PUBLIC INTEREST

I now return to this article's central question: how should federal and state regulators determine the "public interest"? The designation of a second or subsequent ETC in a rural market requires an explicit finding under 47 U.S.C. § 214(e) that such a designation is in the public interest.<sup>151</sup> Competition in telecommunications should flourish in conjunction with universal service, not struggle in spite of it. Administration of the federal universal service program must not impair, much less preclude, competitive entry by wireless carriers. Under current legal, economic, and technological conditions, however, not all ETCs stand on equal footing. The earliest wave of ETC designations in virtually all rural markets involved incumbent carriers relying on wireline technology. Competitive carriers providing

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146. See *Cellco*, 16 F.C.C.R. at 43-44; see also 47 U.S.C. § 254(k) (2000) ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition.")

147. See *Cellco*, 16 F.C.C.R. at 44-45; *First Report & Order*, *supra* note 65, at 8824.

148. *Minn. Cellular Corp.*, 1999 WL 1455080, at \*8 (Minn. Pub. Utils. Comm'n, Oct. 27, 1999).

149. *W. Wireless Corp.*, 16 F.C.C.R. 18,145, 18,133, 18137 (2001); accord, e.g., *Cellular S. License, Inc.*, 17 F.C.C.R. 24,393, 24,401-02 (2002); *RCC Holdings, Inc.*, 17 F.C.C.R. 23,532, 23,540 (2002); *Cellco*, 16 F.C.C.R. at 44, 45.

150. 47 U.S.C. § 254(f) (2000).

151. *Id.* § 214(e)(2), (6); see also *supra* text accompanying notes 81-84.



telecommunications service in these markets often deploy wireless technology. Any method of preserving and advancing universal service in these markets must uphold all components of the public interest, including neutrality as between incumbent and competitive carriers, technological neutrality, portability of support, and rural-urban parity. Any approach that effectively equates the “public interest” with incumbent protection or with the perpetuation of wireline carriage therefore constitutes an unreasonable interpretation of the 1996 Act.

Both the FCC and its state-law counterparts must conduct the public interest analysis required by section 214(e) according to statutory baselines established by the 1996 Act and by other provisions of the Communications Act of 1934.<sup>152</sup> The open-ended phrase “public interest” takes its “meaning from the purposes of the regulatory legislation” that defines the relevant agency’s responsibilities.<sup>153</sup> Statutory “policy is the yardstick by which the correctness of” a regulatory agency’s “actions will be measured.”<sup>154</sup> Although the public interest standard in federal communications law is “a supple instrument for the exercise of discretion by [an] expert body,” it is likewise a charter by “which Congress has charged” the FCC and the states “to carry out its legislative policy.”<sup>155</sup> The public interest “criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power.”<sup>156</sup> Rather than indulge the “mistaken assumption that” a statutory invocation of the public interest “is a mere general reference to public welfare without any standard to guide determinations,” a state commission must confine its analysis to “[t]he purpose of the [Telecommunications] Act, the requirements it imposes, and the context of the provision[s] in question.”<sup>157</sup>

A statute-based approach to determining the public interest binds any legal entity authorized to conduct such an analysis. The FCC, other federal agencies, and the states must all heed congressional directives. Congress did not give states *carte blanche* to render decisions wholly divorced from federal law. “Congress [never] intended for state commissions to have unlimited discretion” to determine the public interest in connection with petitions for ETC designation in rural areas.<sup>158</sup> The failure to adopt a “limiting standard, rationally related to the goals of the Act,” in interpreting

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152. Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in 47 U.S.C. §§ 151-614 (2003), and scattered sections of 47 U.S.C.).

153. NAACP v. FPC, 425 U.S. 662, 669 (1976); *accord, e.g.*, Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413, 1427 (D.C. Cir. 1983); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 & n.22 (D.C. Cir. 1978).

154. Schaffer Transp. Co. v. United States, 355 U.S. 83, 88 (1957).

155. FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940); *accord* FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

156. Fed. Radio Comm’n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285 (1933).

157. N.Y. Cent. Secs. Corp. v. United States, 287 U.S. 12, 24 (1932).

158. *S.D. Preemption Order*, *supra* note 117, at 15,180.

the public interest constitutes reversible error.<sup>159</sup> That a state commission is a creature of state law confers no immunity from the obligation to determine the public interest in accord with federal law. Any allegation that a state public utility commission's "determination is inconsistent with [the Telecommunications Act of 1996] and its implementing regulations" unequivocally "involves [a] federal [legal] question," subject to review and resolution in a federal forum.<sup>160</sup>

Finally, in light of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*,<sup>161</sup> courts must defer to reasonable interpretations by the FCC of the term "public interest." The phrase "public interest," after all, is a statutory term. The FCC has reasoned that Congress, "[i]n establishing a public interest requirement for those areas served by rural telephone companies," intended not so much to facilitate the denial of ETC designation petitions as to ensure "that consumers in rural areas continue to be adequately served should the incumbent carrier exercise its option to relinquish its ETC designation under section 214(e)(4)."<sup>162</sup> As long as a petitioning carrier can "demonstrate[] both the commitment and ability to provide service to any requesting customer within the designated service area using its own facilities" and thereby ensure "that consumers in the affected rural areas will . . . continue to be adequately served should the incumbent carrier seek to relinquish its ETC designation," the public interest favors approval of the competitive ETC petition.<sup>163</sup>

The appropriate scope of the public interest therefore depends on careful consideration of the minimum requirements and outer bounds of sections 214 and 254 of the Communications Act. The FCC's interpretation of those provisions provides further guidance. The failure to heed these interpretive yardsticks may lead to "false negatives" and "false positives" in an analysis of the public interest. A false negative would impair a state commission's ability to recognize how designating a competitive ETC would advance the public interest. The distinct problem of false positives, which is no less treacherous or probable than the prospect of false negatives, arises if a state commission introduces an irrelevant or improper factor into its public interest analysis. After addressing the problem of false negatives, I shall confront the issue of false positives.

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159. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999); accord *Qwest Corp. v. FCC*, 258 F.3d 1191, 1202 (10th Cir. 2001).

160. *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 (11th Cir. 2003). See generally *Verizon Md., Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635 (2002).

161. 467 U.S. 837 (1984).

162. *W. Wireless Corp.*, 16 F.C.C.R. 18,145, 18,139 (2001); accord, e.g., *Cellular S. License, Inc.*, 17 F.C.C.R. 24,393, 24,402-03 (2002); *RCC Holdings, Inc.*, 17 F.C.C.R. 23,532, 23,541 (2002).

163. *RCC Holdings*, 17 F.C.C.R. at 23,541.

I will first examine two broad categories of factors that *must* be considered in a proper public interest analysis. Competitive neutrality, which embraces neutrality as between service providers and technological neutrality, is perhaps the most expansive and most important of these factors. Parity as between rural and urban consumers also plays a vital role. In the last section of Part III, I will examine a factor that state regulators must *not* consider when assessing the public interest. Because competitive carriers do not begin on equal footing *vis-à-vis* incumbents in the quest for ETC status, inquiring into the fiscal impact of additional ETC designations on the Universal Service Fund poses a singularly powerful threat to competitive neutrality. Any consideration of financial pressure on the USF should therefore be banished from determinations of the public interest.

#### A. *Competitive Neutrality and Consumer Choice*

##### 1. Neutrality as Between Service Providers

Competitive neutrality and consumer choice may be the most important components of the public interest. Though not explicitly mentioned in the Telecommunications Act of 1996, competitive neutrality and consumer choice animate the seven universal service principles that are specified in the statute:

1. The availability of “[q]uality services . . . at just, reasonable, and affordable rates.”
2. “Access to advanced telecommunications and information services . . . in all regions of the Nation.”
3. The goal of ensuring parity among “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas,” so that these consumers may “have access to telecommunications and information services, including interexchange services and advanced telecommunications . . . services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”
4. The principle that “[a]ll providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.”
5. The existence of “specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.”

6. Access for “[e]lementary and secondary schools and classrooms, health care providers, and libraries . . . to advanced telecommunications services.”
7. “Such other principles as the Joint Board and the [Federal Communications] Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity . . . .”<sup>164</sup>

“Competitive neutrality” plays a crucial role in the determination of the public interest. Exactly once have the Federal-State Joint Board on Universal Service and the FCC exercised their authority to adopt additional universal service principles as “are necessary and appropriate for the protection of the public interest, convenience, and necessity.”<sup>165</sup> In its initial report and order on universal service, the FCC accepted the Joint Board’s recommendation to adopt “competitive neutrality” as a seventh universal service principle in addition to the six statutory principles outlined in the 1996 Act itself.<sup>166</sup>

Competitive neutrality, “in the context of determining universal service support,” is defined as follows: “Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly nor disfavor one technology over another.”<sup>167</sup> In adopting this principle, the FCC observed that some form of competitive neutrality already pervades many other provisions of the 1996 Act. In particular, neutrality permeates the requirement that universal service support be “explicit,”<sup>168</sup> the requirement that state universal service contributions be “equitable and nondiscriminatory,”<sup>169</sup> and the availability of ETC status to any carrier that meets the criteria stipulated in the Act.<sup>170</sup>

The principle of competitive neutrality contains two distinct components: neutrality as between service providers, plus technological neutrality. Regulators must take care not only to treat competitive carriers on an equal basis *vis-à-vis* incumbent carriers, but also to avoid privileging any technology over another. Technological neutrality offers two distinct benefits. First, by “allow[ing] the marketplace to direct the advancement of technology,” technological neutrality will enhance consumer choice.<sup>171</sup>

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164. 47 U.S.C. § 254(b) (2000).

165. *Id.* § 254(b)(7).

166. *See First Report & Order, supra* note 65, at 8801; *cf.* 47 U.S.C. § 254(b)(1)-(6) (2000).

167. *First Report & Order, supra* note 65, at 8801.

168. 47 U.S.C. § 254(e) (2000).

169. *Id.* § 254(f).

170. *Id.* § 214(e); *see also First Report & Order, supra* note 65, at 8801.

171. *First Report & Order, supra* note 65, at 8802.

Second, technological neutrality improves the public administration of universal service by helping regulators to “avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective.”<sup>172</sup> The FCC expected that its “policy of technological neutrality” would “foster the development of competition” and deter the unfair exclusion of “certain providers, including wireless” carriers, “that may have been excluded from participation in universal service mechanisms if . . . universal service eligibility criteria” had been interpreted “so as to favor particular technologies.”<sup>173</sup>

The FCC maintained its commitment to competitive neutrality in the context of CETC designations by state commissions for rural areas. During public commentary on what became the *First Report & Order* on universal service, the Rural Telephone Coalition urged that the promotion of competition in rural areas be considered “secondary to the advancement of universal service.”<sup>174</sup> The FCC rejected this suggestion as “present[ing] a false choice between competition and universal service.”<sup>175</sup> Rather, the Commission predicted, “competitive neutrality will promote emerging technologies that, over time, may provide competitive alternatives in rural, insular, and high cost areas and thereby benefit rural consumers.”<sup>176</sup> Consistent with the *First Report & Order’s* endorsement of technological neutrality as an essential component of the public interest, the FCC regulation that guides state commissions in designating ETCs expressly prohibits discrimination on the basis of a petitioning carrier’s technological platform: “A state commission shall designate a common carrier that meets the requirements of this section as an eligible telecommunications carrier irrespective of the technology used by such carrier.”<sup>177</sup>

As components of the public interest, competitive neutrality and consumer choice are closely related, if not virtually synonymous. Regulators can best honor the requirement of competitive neutrality by ensuring that the decision whether to grant a petition for ETC designation hinges on those factors that rational consumers weigh in choosing between an incumbent service provider and a new competitor: superior price, quality, and support.<sup>178</sup> The public interest depends on consumer choice, not on

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172. *Id.*

173. *Id.*

174. *Id.* at 8802-03.

175. *Id.* at 8803.

176. *Id.*

177. 47 C.F.R. § 54.201(h) (2002).

178. *Cf.* Minn. Cellular Corp., 1999 WL 1455080, at \*13 (Minn. Pub. Utils. Comm’n, Oct. 27, 1999) (acknowledging how a prospective CETC “made a threshold showing of affordability, reliability, and service quality” as well as “a threshold showing that its service would include specific features and enhancements not available, or available only at a premium, from the incumbents”).

the competitive threat that a market entrant may pose to the incumbent local exchange company.

Equating the public interest with an unlawful call for incumbent protection is one of the most common errors in the law of economic regulation. This misapplication of the public interest standard is especially likely to occur when opponents of new service characterize existing networks as “adequate,” describe new infrastructure as “redundant” or “duplicative,” or undervalue the advantages offered by technologically diverse platforms. The law’s proper focus on consumer welfare precludes assessments of the public interest that rest “on the bare conclusion that existing . . . service” is “adequate.”<sup>179</sup> A survey of the relevant market’s need for service must consider “the inherent advantages of the proposed service,” lest regulators give incumbent service providers “unwarranted protection from competition from others.”<sup>180</sup>

Lower prices also matter. “The ability of one mode of [communication] to operate with a rate lower than competing types of [communication] is precisely the sort of ‘inherent advantage’ that . . . congressional policy” seeks to foster.<sup>181</sup> The law of regulated industries recognizes a strong public interest in the “lower cost of equipment, operation, and therefore service” as one of the “inherent advantages” of any mode of communication.<sup>182</sup> In sum, “no carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers.”<sup>183</sup>

Consumer choice, as measured by the market-driven decisions of a substantial majority of residential customers, is an essential component of the public interest. Congress has directed the Joint Board and the FCC to consider, *inter alia*, “the extent to which such telecommunications services . . . have, *through the operation of market choices by customers*, been subscribed to by a substantial majority of residential customers.”<sup>184</sup> Technological innovations by service providers are also relevant, for the Joint Board and the FCC must also consider “the extent to which . . . telecommunications services . . . are being deployed in public telecommunications networks by telecommunications carriers.”<sup>185</sup> Again, the primacy of consumer choice in public interest analysis precludes the assumption that the terms and conditions of service provided by a

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179. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 90 (1957).

180. *Id.* at 91.

181. *Id.*

182. *ICC v. Mechling*, 330 U.S. 567, 575 (1947); *accord* *Dixie Carriers, Inc. v. United States*, 351 U.S. 56, 59 (1956).

183. *Schaffer*, 355 U.S. at 91 (internal quotation marks omitted).

184. 47 U.S.C. § 254(c)(1)(B) (2000) (emphasis added).

185. *Id.* at § 254(c)(1)(D).

competitive carrier should match the terms and conditions offered by an incumbent ETC. Diversity among options for “local usage” including but not limited to variations in price, the number of minutes available without additional charge, the geographic boundary between local and long distance service, and the ability to make and receive calls while away from home should be considered as having a positive rather than negative impact on the public interest.

Because many localities, especially in rural America, are still served by no more than one telecommunications carrier, an additional carrier’s commitment to serve all customers represents a very significant improvement in consumer choice. From the passage of the Communications Act of 1934 to the termination of the Modified Final Judgment that supervised the breakup of the Bell System,<sup>186</sup> local telephony remained the most intractable monopoly in the American economy.<sup>187</sup> Opening local telecommunications markets to competition thus represented the centerpiece of the Telecommunications Act.<sup>188</sup> The increase in competition and market choice since 1996 has benefited consumers in numerous ways, ranging from reduced prices to improved service and technological innovation. Perhaps more than any other development during the past seven years, the opening of local telecommunications markets has directly advanced the purposes Congress articulated in the preamble to the Telecommunications Act of 1996: to “promote competition and reduce regulation,” “secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies.”<sup>189</sup>

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186. See Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 56, 143-44 (terminating the Modified Final Judgment, among other antitrust decrees).

187. See *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 475-76 (2002) (“The [Bell breakup] decree did nothing . . . to increase competition in the persistently monopolistic local markets, which were thought to be the root of natural monopoly in the telecommunications industry.”).

188. See *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 371 (1999).

189. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 56 (preamble).

## 2. Technological Neutrality

The FCC has demanded technological neutrality when state commissions review ETC designation petitions. The agency's unambiguous rule on this point bears repeating: "A state commission shall designate a common carrier that meets the requirements of this section as an eligible telecommunications carrier irrespective of the technology used by such carrier."<sup>190</sup> True to this directive, the Minnesota Public Utilities Commission has historically acknowledged its duty "under the [Telecommunications] Act and the FCC rules... to refrain from discriminating against [ETC] applicants on the basis of technology."<sup>191</sup>

Fidelity to technological neutrality means that a state commission, when considering a petition by a wireless carrier to be designated as an ETC, cannot impose conditions or adopt policies that would burden the wireless petitioner in ways that an incumbent wireline carrier is not burdened. Opportunities to apply or violate the technological neutrality principle abound. For instance, if a wireline carrier is eligible to receive USF support for a metered local usage plan, a wireless carrier must be equally eligible. Similarly, state commissions must not reflexively oppose competitive measures that exploit the comparative advantage of wireless carriers relative to their wireline competitors. Competition over expanded local calling areas, system features, and other customer options is essential to the ability of wireless carriers to compete against wireline incumbents. In addition, a state commission may not demand that a wireless carrier connect a new customer in a shorter time frame than that required of the wireline LEC.

A state commission may not condition the designation of a competitive wireless carrier as an ETC on the fulfillment of requirements that have no technological analogue in a wireline platform. It is absurd, for example, to base a wireless carrier's eligibility for federal universal service support on its decision to offer its customers a .6-watt handheld unit instead of a 3-watt phone. Frivolously contesting the adequacy of customer premises equipment offered by rivals is one of the oldest strategems known to incumbent carriers.<sup>192</sup> One might have thought wrongly, it seems that

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190. 47 C.F.R. § 54.201(h) (2002).

191. Minn. Cellular Corp., Docket No. P-5695/M-98-1285, slip op. at 8-10, 1999 WL 1455080, at \*8 (Minn. Pub. Utils. Comm'n., Oct. 27, 1999); see also *id.* at \*10 (expressing the MPUC's desire to avoid making designation decisions according to "the intrinsic characteristics of wireless technology").

192. See, e.g., *Hush-a-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (describing the overly broad tariff provisions against foreign attachments as an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental"); *Use of the Carterfone Device in Message Toll Tel. Servs.*, 14 F.C.C.2d 571, 572-73 (1968) (striking the foreign attachment tariffs in their entirety after AT&T failed to produce concrete proof of a "cream skimming"



telecommunications law had long ago won the war to liberate the market for “equipment known to the Bell Telephone-Western Electric complex as ‘foreign attachments.’”<sup>193</sup> This anticompetitive litigation tactic has no place in the deregulatory environment established by the 1996 Act.

The FCC’s 2000 order in *Cellco*<sup>194</sup> vividly illustrates the requirements of technological neutrality. In that proceeding, the Commission squarely “reject[ed] the contention” that a wireless carrier “lacks the ‘requisite quality and reliability’ because it relies on a ‘handheld’ cellular technology.”<sup>195</sup> The FCC found “[n]o credible evidence” supporting the exclusion of wireless providers from eligibility for USF support “due to [the] alleged technological limitations of mobile service.”<sup>196</sup> Ultimately, the FCC rejected an even more aggressive ILEC proposal to “impose a ‘landline substitutability’ requirement” that would have erected a massive barrier to CETC designation without providing any functional benefit to consumers.<sup>197</sup>

The public interest depends on the development, deployment, and “provision of new technologies and services to the public.”<sup>198</sup> At the very least, an entire body of law dedicated to reforming markets “affected with a public interest”<sup>199</sup> should be interpreted so as to favor rapid technological innovation over incumbent protection.<sup>200</sup> Congress explicitly contemplated that the definition of universal service would change over time. According to the 1996 Act, “[u]niversal service is an evolving level of telecommunications services that the Commission shall establish periodically . . . , taking into account advances in telecommunications and information technologies and services.”<sup>201</sup> The legislative history of the Telecommunications Act makes it abundantly clear “that the definition of universal service [should] evolve[] over time to keep pace with modern

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effect” that outweighed “the benefits of interconnection”); *Use of Recording Devices in Connection with Telephone Servs.*, 11 F.C.C. 1033, 1036 (1948) (invalidating foreign attachment provisions that prohibited recording devices with no “perceptible effect on the functioning of the telephone apparatus or the quality of the telephone service”). *See generally* Chen, *supra* note 48, at 843-44.

193. *Applications of Microwave Communications, Inc.*, 18 F.C.C.2d 953, 978 (1969) (statement of Johnson, Comm’r).

194. *Cellco P’ship d/b/a Bell Atl. Mobile*, 16 F.C.C.R. 39 (2000).

195. *Id.* at 43.

196. *Id.*

197. *Id.* at 44.

198. 47 U.S.C. § 157(a) (2000); *see* Hausman & Shelanski, *supra* note 54, at 27-28.

199. *Munn v. Illinois*, 94 U.S. 113, 130 (1876).

200. *Cf.* DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* 123-27 (1999) (urging the adoption of an interpretive canon counseling the construction of environmental statutes in favor of more robust environmental protection).

201. 47 U.S.C. § 254(c)(1) (2000).

life.”<sup>202</sup> Periodic revisions in “the list of telecommunications and information services included in the definition of universal service” help “ensure that all Americans share in the benefits of the information superhighway.”<sup>203</sup> Ultimately, Congress “intend[ed] the definition of universal service” to evolve so as

to ensure that the conduit, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, has sufficient capacity and technological capability to enable consumers to use whatever consumer goods that they have purchased, such as a telephone, personal computer, video player, or television, to interconnect to services that are available over the telecommunications network.<sup>204</sup>

The Senate’s deliberations over telecommunications reform highlight the technologically dynamic nature of universal service. The Senate Commerce Committee acknowledged that “touch tone telephone service is widely available today and is used by a substantial majority of residential customers to access services like voice mail, telephone banking, and mail order shopping services.”<sup>205</sup> Just as the current state of technology and its adoption by a substantial majority of residential customers preclude acceptance of conventional “rotary party line service as sufficient to meet the minimum definition of universal service,” touch tone service itself might eventually fail to “satisfy the evolving definition of universal service if the substantial majority of residential consumers use” more advanced means of communication.<sup>206</sup> Even if contemporary technology and consumer preferences fall short of the “two-way interactive full motion video service” that the Senate contemplated,<sup>207</sup> no assessment of the public interest can ignore changes in technological capacity and consumer choice.

Courts have long understood that the public interest standard does not permit a regulatory agency “to penalize innovation and ignore the . . . benefits resulting from such innovation by declaring each new and innovative service offering or operating mode a discrete submarket subject to unique regulatory . . . treatment.”<sup>208</sup> The extensive attention that Congress lavished upon technological evolution in defining universal service makes it essential that public interest analysis in the context of federal support for universal service remain dynamic.

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202. S. CONF. REP. NO. 104-230, at 128 (1996).

203. S. REP. NO. 103-367, at 33 (1994).

204. S. REP. NO. 104-230, at 27 (1995).

205. *Id.*

206. *Id.*

207. *Id.*

208. *United States v. FCC*, 652 F.2d 72, 99 (D.C. Cir. 1980) (quotes omitted).

Two specific features of the universal service program reflect the federal commitment to technological improvement. First, federal law strongly favors facilities-based competition. To qualify as an ETC, a carrier must either “us[e] its own facilities” or, at a minimum, combine “its own facilities” with “resale of another carrier’s services.”<sup>209</sup> To state the point somewhat differently, no carrier that conducts its business solely by reselling services provided by another carrier can receive federal universal service support. The specifics of federal USF support reinforce the preference for facilities-based competition. The FCC’s implementing regulations grant a competitive eligible telecommunications carrier “the full amount of universal service support that the incumbent LEC would have received for [a new] customer,” but only to the extent that the CETC “provides the supported services using neither unbundled network elements purchased” from an ILEC “nor wholesale service purchased” from an ILEC.<sup>210</sup> The same conditions govern full support for CETC provision of USF-supported services previously delivered by an ILEC and the corresponding reduction of USF support to the ILEC in question.<sup>211</sup> Neither the 1996 Act nor the FCC’s implementing regulations prescribe the technological path by which a CETC is expected to deliver facilities-based competition. It suffices that a CETC build its own facilities, at least in part, so that consumers will enjoy alternative sources of telecommunications service and so that competitive and incumbent ETCs alike will have an incentive to improve the technological platforms on which their businesses rest.

Notably, federal telecommunications law recognizes the public interest in technological progress even when it is reflected in new services not directly supported by the federal universal service program. Although the FCC has declined to add “advanced or high-speed services” to the list of services supported by the USF,<sup>212</sup> the Commission has reaffirmed the principle that federal “universal service policies should not inadvertently create barriers to the provision of [or] access to advanced services.”<sup>213</sup> In other words, even if text messaging and wireless Internet access currently fall outside the list of services supported by the USF, the federal universal

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209. 47 U.S.C. § 214(e)(1)(A) (2000).

210. 47 C.F.R. § 54.307(a)(3) (2002).

211. *See id.* § 54.307(a)(4).

212. *See* Fed.-State Joint Bd. on Universal Serv., 17 F.C.C.R. 14,095, 14,102 (2002) [hereinafter *July 2002 Recommended Decision*]. In a notice of proposed rulemaking released February 25, 2003, the FCC solicited public comment on whether one of the services at issue in the *July 2002 Recommended Decision* — namely, equal access to interexchange service — satisfies the statutory criteria named in 47 U.S.C. § 254(c). *See* Fed.-State Joint Bd. on Universal Serv., 18 F.C.C.R. 2932 (2003).

213. *MAG Plan Order*, *supra* note 76, at 11,244, 11,322 (2001); *accord July 2002 Recommended Decision*, 17 F.C.C.R. at 14,102.

service program encourages “the deployment of modern plant capable of providing access to [such] services.”<sup>214</sup>

The consideration of technological advancement in the designation of an eligible telecommunications carrier promotes the public interest in community health and safety. Congress directed that the evolving definition of universal service should consider “the extent to which [federally supported] telecommunications services . . . are essential to education, public health, or public safety.”<sup>215</sup> Within the narrow scope of their authority to impose “competitively neutral . . . requirements necessary to preserve and advance universal service,” states may adopt measures to “protect the public safety and welfare.”<sup>216</sup> In this regard, the dramatic improvement in access to emergency services such as 911 and “enhanced” 911<sup>217</sup> that would be realized upon full deployment of a competitive carrier’s wireless platform strongly supports the public interest in the designation of that carrier as an eligible telecommunications carrier.

### B. Rural-Urban Parity

Congress has also identified a strong public interest in rural-urban parity. In designing the federal universal service program, Congress showed considerable solicitude toward rural residential customers. Long distance as well as local service is an integral component of universal service. If anything, rural parity with urban long distance customers won a lion’s share of congressional attention during the formulation of the 1996 Act. Congress directed the FCC to “adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas.”<sup>218</sup> This provision was designed “to incorporate the policies of geographic rate averaging and rate integration of interexchange services” so that rural and high cost subscribers would be “able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers.”<sup>219</sup> The cascade of legal terms beginning with the prefixes “intra-” and “inter-” ought not obscure the bottom line: Congress took pains to ensure that rural residential customers would not be disadvantaged *vis-à-*

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214. *MAG Plan Order*, *supra* note 76, at 11,322; *accord July 2002 Recommended Decision*, 17 F.C.C.R. at 14,102 (2002).

215. 47 U.S.C. § 254(c)(1)(A) (2000).

216. *Id.* § 253(b).

217. *See* 47 C.F.R. § 54.101(a)(5) (2002) (identifying access to emergency services, including 911 and enhanced 911, as one of nine supported services under the federal universal service program).

218. 47 U.S.C. § 254(g) (2000).

219. S. CONF. REP. NO. 104-230, *supra* note 202, at 132.

*vis* their urban counterparts when calling outside an ILEC's local calling area. Designation of a CETC therefore advances the public interest to the extent the entrant can carry calls that an ILEC would treat as intraLATA or even interLATA long distance.<sup>220</sup> Put somewhat differently, a CETC's ability to provide a local calling area that exceeds the technologically constrained geographic footprint of a wireline-based ILEC represents a significant positive contribution to the public interest. After all, a new wireless carrier's local calling area is often larger than the local area served by the wireline ILEC.<sup>221</sup> Providing deeper geographic reach for the same local subscription rate delivers a significant benefit to the consumer.

Public policy considerations reinforce the 1996 Act's explicit inclusion of long distance calling and/or larger local calling areas within the statutory definition of the public interest. Given the greater geographic scope of many rural dwellers' daily lives, Congress's concern with calling outside the boundaries of ILEC exchanges (and, by extension, the ability to roam with wireless telephony while traveling) reflects sound public policy. Statically depicting universal service as local exchange access in the sense of "plain old telephone service," or POTS, also ignores the value that accrues to rural residents when others traveling in their communities are able to use new wireless infrastructure to roam.<sup>222</sup> Each individual consumer of telecommunications services, including low-income and/or high-cost consumers, benefits from a network that embraces the highest possible number of users, regardless of whether other users share any individual consumer's characteristics.<sup>223</sup>

Wireless platforms offer an economically rational and highly efficient method of intermodal competition in local telephony, particularly in rural and other high-cost areas. Wireless telecommunications media perform most effectively where dispersed populations, forbidding climates, or "unaccommodating" terrain compromises the effectiveness of a wireline

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220. The acronym LATA stands for "local access and transport area." The Modification of Final Judgment, which forced the Bell system to divest its local exchange company affiliates, prohibited the newly created Bell operating companies from carrying long-distance calls across LATA boundaries. See *United States v. W. Elec. Co.*, 569 F. Supp. 1057, 1108 (D.D.C. 1983). Under the Bell breakup decree, however, calls *within* a LATA remained fair game. As a result, even though the Bell operating companies were barred from interLATA carriage, their "financial viability" hinged in large part on long-distance revenues from intraLATA carriage. *United States v. W. Elec. Co.*, 569 F. Supp. 990, 995 n.23 (D.D.C. 1983).

221. See *WWC Holding Co. f/k/a/ Minn. Cellular Corp.*, Docket No. P-5695/M-98-1285, slip op. at 6, 2000 WL 668286, at \*4 (Minn. Pub. Utils. Comm'n, April 19, 2000).

222. See HENK BRANDS & EVAN T. LEO, *THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS* 703 (1999) (providing definitions of POTS ("plain old telephone service") and PANS ("pretty amazing new services").

223. See *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 406 n.2 (5th Cir. 1999); Eli M. Noam, *Will Universal Service and Common Carriage Survive the Telecommunications Act of 1996?*, 97 COLUM. L. REV. 955, 958-59 (1997). See generally Lemley & McGowan, *supra* note 26.

platform and raises its operating costs.<sup>224</sup> At least under the existing state of communications technology, wireless platforms promise the most economically robust alternative to the ILECs' wireline legacy networks.<sup>225</sup> By extending "the full amount of universal service support that [an] incumbent LEC would . . . receive[]" per customer to a "competitive eligible telecommunications carrier that provides . . . supported services using neither unbundled network elements . . . nor wholesale service" purchased from an ILEC, the federal universal service program strongly favors this very sort of facilities-based competition.<sup>226</sup>

Opponents of CETC designations frequently suggest, first, that sparse population spreads costs so thinly in rural areas that competitive carrier capture of ILEC lines would increase the per-line cost of serving the remaining lines increases and, second, that this "harm" to an incumbent carrier outweighs any benefits derived from competition.<sup>227</sup> In other words, the more remote the area, the more important it is to have exactly one carrier. Taken to their logical conclusions, these arguments counsel *per se* rejection of *all* petitions for CETC designation in rural areas. Such a refusal to embrace competitive entry into rural markets, however, is tantamount to rejecting one of the fundamental tenets of the federal universal service program: rural-urban parity.<sup>228</sup>

As matters stand, rural consumers do not enjoy parity with their urban counterparts. The very reason high-cost support is needed is because it is very expensive to provide service to rural areas.<sup>229</sup> The FCC has deemed it "unreasonable to expect an unsupported carrier to enter a high-cost market and provide a service that its competitor" typically an incumbent "already provides at a substantially supported price."<sup>230</sup> The paradigmatically procompetitive phenomenon of wireless-for-wireline substitution relies on universal service support and the ETC designation process that controls

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224. See *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 617 (5th Cir. 2000) ("Rural areas where telephone customers are dispersed and terrain is unaccommodating are . . . the most expensive to serve.")

225. See, e.g., Lisa M. Warner, *Wireless Technologies Creating Competition in the Local Exchange Market: How Will Local Exchange Carriers Compete?*, 4 COMMLAW CONSPECTUS 51, 52 (1996); Eric Thoreson, Comment, *Farewell to the Bell Monopoly? The Wireless Alternative to Local Competition*, 77 OR. L. REV. 309, 336 (1998).

226. 47 C.F.R. § 54.307(a)(3), (4) (2002).

227. Cf. *MAG Plan Order*, *supra* note 76, at 11,244, 11,326 ("[A]s an incumbent 'loses' lines to a competitive eligible telecommunications carrier, the incumbent must recover its fixed costs from fewer lines, thus increasing its per-line costs.")

228. See 47 U.S.C. § 254(b)(2) (2000).

229. See *Alenco*, 201 F.3d at 617.

230. *S.D. Preemption Order*, *supra* note 117, at 15,177; see also *First Report & Order*, *supra* note 65, at 8932 (acknowledging that competition and affordable access to telecommunications service in high-cost areas depend on competitive neutrality as between entrants and ILECs).

access to federal subsidies.<sup>231</sup> Although the federal universal service program has reduced some of the “differences in service costs between rural and urban markets,” urban consumers continue to enjoy a choice of “at least two more competitors” offering wireless carriage relative to their rural counterparts.<sup>232</sup> Eliminating CETC designations in rural areas would betray the congressional promise that “rural, insular, and high-cost areas” should have services “reasonably comparable” to those available in urban areas and at “reasonably comparable” rates.<sup>233</sup>

The law cannot tolerate purported public interest arguments that systematically discriminate against carriers not only according to their competitive status, but also according to the technology that they deploy. At a minimum, it offends the principle of competitive neutrality to subsidize incumbent carriers while simultaneously depriving their competitors of universal service funding. At an extreme, the imposition by a state commission of “such onerous eligibility requirements that no otherwise eligible carrier could receive designation . . . would probably run afoul of” the commission’s mandate under section 214(e)(2) to “designate” eligible carriers.<sup>234</sup> Regardless of the precise theory by which it reaches this conclusion, federal law prohibits schemes under which incumbent carriers fight freestyle with public funding, while their competitors must contest high-cost markets according to Marquis of Queensbury rules.<sup>235</sup>

The baneful tendency to equate the public interest with incumbent protection arises from a fundamental misunderstanding of the nature of competition among publicly subsidized firms. Incumbent carriers routinely decry the introduction of competition in rural markets, including by extension of universal service support to competitive carriers, as a form of subsidized, “artificial competition.”<sup>236</sup> The trouble with condemning

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231. See Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Commercial Mobile Servs., 16 F.C.C.R. 13,350, 13,438 & n.24 (2001); Annual Report & Analysis of Competitive Mkt Conditions with Respect to Commercial Mobile Servs., 15 F.C.C.R. 17,660, 17,788 & n.20 (2000).

232. Annual Report & Analysis of Competitive Mkt. Conditions with Respect to Commercial Mobile Servs., 17 F.C.C.R. 12,985, 13,024 (2002).

233. *Id.*

234. *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 418 n.31 (5th Cir. 1999); accord *S.D. Preemption Order*, *supra* note 117, at 15,174 n.31; N.D. Pub. Serv. Comm’n, Case No. PU-1564-98-428, at ¶ 36 (Dec. 15, 1999).

235. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (observing that constitutional protection of free speech prevents the government from “licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules”).

236. See, e.g., National Telecommunications Coop. Association, Press Release, *Telecom Industry Group Addresses Universal Service at Senate Hearing* (April 3, 2003) at [http://www.ntca.org/press/releases/pr\\_040203.html](http://www.ntca.org/press/releases/pr_040203.html) (arguing that Congress should “[e]nsur[e] that current law be adhered to which mandates that universal service support be provided for actual cost recovery and not be used as a tool to incite artificial cost competition”); Hutchinson Tel. Co. & Telecomms., Inc., Press Release, at [http://www.hutchtel.net/html/s\\_press\\_C.html](http://www.hutchtel.net/html/s_press_C.html) (n.d.) (denouncing a Minnesota bill that allegedly “would impose artificial competition in areas where

universal service support for competitive carriers as “artificial,” however, is that rural telephone companies are themselves the products of public policies consciously adopted and deliberately intended to subsidize telecommunications service in remote areas where the cost of delivering service is extremely high. Incumbent carriers cannot simultaneously condemn policies extending subsidies to their competitors and demand the continued flow of support to their own coffers. When an incumbent carrier depends so heavily upon public largesse, a public decision to subsidize a competitor is no more “artificial” than the incumbent’s dominance of that market is “natural.”

In spite of the evident benefits of technological neutrality, and in spite of the potential contribution of wireless carriers to rural markets, state regulators often misunderstand the relationship of these factors to the public interest. In each of its annual reports since 1999 on competition in the market for commercial mobile services, the FCC has recognized the increased profile of wireless carriers in the telecommunications market.<sup>237</sup> The Commission has taken particular care to note that this procompetitive phenomenon relies on universal service support and on the ETC designations that are a prerequisite to qualification for financing from the USF. As competitive wireless carriers enlarge their share of the telecommunications market, incumbent wireline carriers have ever greater incentive to retaliate through the legal system. In the first of these annual reports, the FCC identified the potential of state-law rules governing ETC designations to “discriminat[e] unfairly against” wireless providers.<sup>238</sup> Much of this discrimination stems from the introduction of unlawful factors into the public interest analysis that state regulators must perform when deciding whether to grant a competitive carrier’s petition for designation as an ETC. The next section of this article will examine the leading example of an unlawful consideration in public interest analysis.

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an efficient market can only support one provider”); Reply Comments of GTE Alaska Inc., Consideration of Market Structure Rules Governing Local Exch. Competition in Alaska, No. R-97-12, at 3 (Alaska Pub. Utils. Comm’n, Nov. 19, 1997) (opposing the revocation of all rural exemptions for telecommunications carriers in Alaska by arguing that “Alaskans will benefit most by fair policies that allow competitive markets to develop naturally rather than by artificial competition that is hurriedly manufactured by government edict”), available at <http://www.state.ak.us/rca/telecomm/r97012/R97012.html>; cf. Jonathan S. Adelstein, *Rural America and the Promise of Tomorrow*, Address at NTCA Annual Meeting and Expo (Feb. 3, 2003), transcription available at <http://www.fcc.gov/commissioners/adelstein/speeches2003.html>. (“Federal support is intended to promote universal service, not to subsidize artificial competition or, for that matter, to keep it at bay.”).

237. See Implementation of § 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 16 F.C.C.R. 13,350, 13,438 & n.24 (2001); Implementation of § 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 15 F.C.C.R. 17,660, 17,788 & n.20 (2000).

238. See Implementation of § 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 14 F.C.C.R. 10,145, 10,270 (1999).



### C. The Financial Impact of ETC Designations

#### 1. An Impermissible Factor

There is no legal basis for a state commission to consider the financial impact of a prospective ETC designation on the federal Universal Service Fund as a factor relevant to the public interest. The adequacy of *federal* funding for high-cost support in the *federal* Universal Service Fund is a question of *federal* law and policy that can and must be addressed solely by *federal* authorities. It is one thing for a state commission or the FCC to ignore one statutory principle in order “[t]o satisfy a countervailing statutory principle.”<sup>239</sup> It is an entirely different matter to place dispositive weight on a factor that not only lacks statutory support but also contradicts the firmly established public interest in competitive neutrality, consumer choice, and rural-urban parity.

The FCC’s current rules do not treat the presumed financial impact of ETC designations on the Universal Service Fund as a component of the public interest. The FCC has repeatedly and consistently rebuffed calls to curb CETC designations in order to relieve financial pressure on the growth of the USF. In its *First Report & Order* on universal service, despite acknowledging that “overly expansive universal service mechanisms potentially could harm all consumers by increasing the cost of telecommunications services for all,”<sup>240</sup> the FCC “reject[ed] proposals to establish a principle to minimize the size and growth of the universal service fund.”<sup>241</sup> Instead, the Commission expressed its confidence in the ability of “competitive and market-based universal service techniques” to “limit the size of the support mechanisms by providing affordable, cost-effective telecommunications services in many regions of the nation that are now dependent upon universal service support.”<sup>242</sup>

In 2001, the FCC explicitly declined to endorse a proposed moratorium on CETC designations in rural areas. This would-be moratorium, proposed by the Joint Board’s Rural Task Force, was motivated by concern over allegedly excessive growth in the demand for federal universal service support.<sup>243</sup> Among the plan’s “significant

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239. *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000); *see also Qwest Corp. v. FCC*, 258 F.3d 1191, 1199 (10th Cir. 2001) (“The FCC may balance [statutory] principles against one another, but must work to achieve each one unless there is a direct conflict between it and either another listed principle or some other obligation or limitation on the FCC’s authority.”).

240. *First Report & Order*, *supra* note 65, at 8829; *see also Alenco*, 201 F.3d at 620 (observing that “excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market”).

241. *First Report & Order*, *supra* note 65, at 8805.

242. *Id.* at 8806.

243. *See MAG Plan Order*, *supra* note 76, at 11,293-99, 11,325-26.

drawbacks,” the FCC reasoned that a moratorium on CETC designations would create “disincentives to infrastructure investment by rural carriers.”<sup>244</sup> In November 2002, the FCC invited full reconsideration of “the specific concerns raised [by] the Rural Task Force . . . regarding excessive growth in the fund.”<sup>245</sup> At the same time, however, the FCC unequivocally reaffirmed the principle that “[s]upport for competitive ETCs currently is not capped under the Commission’s rules.”<sup>246</sup>

Throughout these developments, the FCC has maintained a consistent approach to purported financial pressure stemming from the designation of CETCs in rural study areas. Concerns over the allegedly “unsustainable” growth in “demand on universal service funding,” the FCC concluded in its most recent decisions to designate ETCs pursuant to section 214(e)(6), lie “beyond the scope of” proceedings whose sole task is to decide whether to “designate[] a particular carrier as an ETC.”<sup>247</sup>

The lone fragments of federal legal support for the proposition that financial pressure on the universal service fund is relevant to the public interest consist of separate statements by two individual Federal Communications Commissioners. First, in a separate statement related to the FCC’s 2001 *MAG Plan Order*, Commissioner Kevin J. Martin expressed “some concerns with the Commission’s policy adopted long before [that] Order of using universal support as a means of creating ‘competition’ in high cost areas.”<sup>248</sup> Despite expressing “real pause” at the prospect that “subsidiz[ing] multiple competitors to serve areas in which costs are prohibitively expensive for even one carrier” might “lead[] to inefficient and/or stranded investment and a ballooning universal service fund,” Commissioner Martin “sign[ed] on to an Order that may further this policy.”<sup>249</sup> Second, in remarks before the 2003 meeting of the National Telecommunications Cooperative Association, Commissioner Jonathan S. Adelstein announced his belief that the FCC should “ensure that the benefits that come from increasing the number of carriers we fund outweigh the burden of increasing contributions [from] consumers.”<sup>250</sup> The upshot of these separate statements by Commissioners Martin and Adelstein is that the FCC’s prevailing policy of severing any discussion of financial impact on federal universal service funds from CETC designation

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244. *Id.* at 11,294; *see also id.* at 11,297 (“[A]t this time, the costs of adopting the Rural Task Force’s proposal to freeze high-cost loop support . . . would significantly outweigh the potential benefits”).

245. Federal-State Joint Bd. on Universal Serv., 17 F.C.C.R. 22,642, 22,646 (2002).

246. *Id.*

247. Cellular S. License, Inc., 17 F.C.C.R. 24,393, 24,406 (2002); RCC Holdings, Inc., 17 F.C.C.R. 23,532, 23,545 (2002).

248. *MAG Plan Order*, *supra* note 76, at 19,770 (separate statement of Martin, Com’r).

249. *Id.*

250. Adelstein, *supra* note 236.

decisions remains just that, the FCC's prevailing policy.<sup>251</sup> A state regulatory commission may or may not be sympathetic to these commissioners' sentiments, but like them state regulators must obey controlling federal law.

The Supreme Court of Utah has considered the impact of ETC designation on *state* universal service funds as a basis for upholding that state's public service commission's denial of ETC status to a competitive wireless carrier.<sup>252</sup> That decision supplies no persuasive support for considering the impact on the *federal* Universal Service Fund. The Utah court mistakenly assumed that its state's public utility regulators enjoyed unbounded discretion to construe the "public interest" standard established by the federal Telecommunications Act.<sup>253</sup> Indeed, the court went so far as to upbraid the unsuccessful ETC petitioner for failing to "cite[] any authority which explicitly limits the factors the [Utah Public Service Commission] can consider in determining what is, or is not, in the public interest."<sup>254</sup> As I have already demonstrated, the states must anchor their public interest analysis in the language, structure, and purposes of the Telecommunications Act of 1996. The Utah court's failure to recognize this principle undermined its decision. Even more objectionable, though, was the Utah court's assumption that "additional ETC designations" in rural markets "could be in the public interest" as long as "*incumbent* ETCs can reduce costs sufficiently such that" the designation of additional ETCs for rural markets would impose "no additional burdens . . . on the State Fund."<sup>255</sup> Such reasoning unacceptably conditions access to ETC status and with it, access to federal universal service funding on the fiscal health and well-being of incumbent carriers.

Simply as a matter of self-interest, it is hard to imagine why any state would deny ETC status to a carrier proposing to serve its rural markets and to clear the multiple regulatory hurdles needed to secure federal funding. The certifying state would receive the benefit of the subsidy, while any pressure on the universal service fund would be realized at a national level, where the state's share of the eventual financial burden would be relatively trivial. Under those assumptions, an unlawful preference for incumbent carriers seems more plausible than an altruistic concern for national fiscal responsibility as a state's motivation for refusing to designate additional ETCs in rural markets.

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251. *Cf.* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 176 n.10 (1980) ("The comments in the dissenting opinion about . . . the correct statement of the equal protection rational-basis standard . . . are just that: comments in a dissenting opinion.")

252. *See* WWC Holding Co. v. Pub. Serv. Comm'n, 44 P.3d 714, 719-20 (Utah 2002).

253. *See id.* at 719.

254. *Id.*

255. *Id.* (emphasis added).

Even mere contemplation of the financial impact on the USF as part of a decision to deny a competitive carrier's petition for ETC designation constitutes reversible error and grounds for preemption. The Telecommunications Act bans any "State or local regulation, or other State or local legal requirement, [that] prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>256</sup> The Act specifically conditions "the ability of a State to impose . . . requirements necessary to preserve and advance universal service" on the state's compliance with the principle that such requirements be set forth and applied "on a competitively neutral basis."<sup>257</sup> Congress has directed the FCC to "preempt the enforcement of [any] statute, regulation, or legal requirement" that violates the federal mandate to remove barriers to entry into local and interstate telecommunications markets.<sup>258</sup>

Preemption under section 253 "is virtually absolute and its purpose is clear — certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena."<sup>259</sup> Failure to satisfy even a single universal service principle, especially that of competitive neutrality, strips a state of any ability to seek shelter from preemption. Indeed, a state's failure to ensure competitive neutrality in its administration of the universal service program requires the FCC to preempt state law.<sup>260</sup> Cognizant of the anticompetitive potential of intransigence by state commissions on ETC petitions by competitive carriers, the FCC has exercised its statutory powers under to preempt state-law requirements that a carrier provide supported services throughout a service area before being designated as an ETC.<sup>261</sup>

Even if a state could lawfully consider the financial sustainability of federal universal service mechanisms in response to an ETC designation petition — that is, even if such a discussion were not grounds for preemption — considerations of sound public policy would counsel deference by state regulatory commissions to the expertise and exclusive jurisdiction of the FCC. Plainly put, states are poorly suited to address the financial impact of ETC designations on the federal Universal Service Fund. Because federal support mechanisms are funded on a national basis,

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256. 47 U.S.C. § 253(a) (2000). See generally *S.D. Preemption Order*, *supra* note 117, at 15,172-81 (analyzing federal preemption of anticompetitive regulations under state or local law).

257. 47 U.S.C. § 253(b) (2000).

258. *Id.* § 253(d).

259. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9th Cir. 2001).

260. See *RT Communications, Inc. v. FCC*, 201 F.3d 1264, 1269 (10th Cir. 2000); *S.D. Preemption Order*, *supra* note 117, at 15,176; *Silver Star Tel. Co.*, 12 F.C.C.R. 15,639, 15,657 (1997).

261. See *S.D. Preemption Order*, *supra* note 117, at 15,168.

this controversy does not turn on issues specific to any particular state. Rather, its resolution will hinge on issues that apply generally to all current and potential ETCs and to all consumers contributing to the federal fund by way of wireless and wireline phone use. These stakeholders' interests affect the entire country, and they deserve a coherent, national forum. If individual states were to consider the growth of the fund as part of public interest analysis, they would create a patchwork of standards for eligibility to receive federal universal service support. The most salient factor explaining state-to-state differences would be the varying extent to which incumbent carriers have captured state public utility regulators — perhaps the worst byproduct of decentralized decisionmaking. The result would create a stark and ultimately unlawful contrast with the uniform standard for contributions to the fund.<sup>262</sup>

At a minimum, the formation of any policy designed to curb allegedly excessive growth in the federal USF should and will take place at the federal level. The FCC's November 2002 order promises as much. In the meanwhile, states must not inject this factor into their analysis of the public interest in ETC designation proceedings. Until the FCC conclusively resolves this issue, any consideration by a state commission of the impact of CETC designations on the solvency of the federal Universal Service Fund would violate the Telecommunications Act.

In response to the November 2002 order, the Federal-State Joint Board on Universal Service has invited public comments concerning the process for designating ETCs and the methodology for calculating support in rural markets with more than one ETC.<sup>263</sup> Diverse proposals for reform, ranging from the imposition of a moratorium on CETC designations to reconsideration of the embedded cost mechanisms and the derivation of “[per-line] portable universal service support for [all] ETCs” from “the support that the incumbent LEC would receive for the same line,” now lie before the Joint Board.<sup>264</sup> In the meanwhile, the FCC has announced its intention to “modify[] the [USF’s] existing revenue-based methodology” so that “universal service contributions” will be “based on contributor-provided projections of collected end-user interstate and international telecommunications revenues, instead of historical gross-billed revenues.”<sup>265</sup>

Although this interim step should “improve competitive neutrality among contributors” and may “sustain the universal service fund and

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262. See 47 U.S.C. § 254(b)(4) (2000) (“All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.”).

263. See Comment on Certain of the Comm’n’s Rules Relating to High-Cost Universal Serv. Support & the ETC Designation Process, 18 F.C.C.R. 1941 (2003).

264. Federal-State Joint Bd. on Universal Serv., 17 F.C.C.R. 22,642, 22,245-46 (2002) [hereinafter *November 2002 Order*].

265. Federal-State Joint Bd. on Universal Serv., 17 F.C.C.R. 24,952, 24,952 (2002).

increase the predictability of support in the near term,” the FCC admits that this incremental step does not yet represent “more fundamental reform[].”<sup>266</sup> The Commission has also directed the Joint Board to reconsider the FCC’s current rules permitting high-cost support for all residential and business connections provided by ETCs, including second lines.<sup>267</sup> Finally, as though to express its exasperation at the ideological distance between “parties [who] . . . argue[] that shortcomings in the current system hamper the emergence of competition in rural areas” and other parties who “have expressed concerns that universal service goals will be undermined if state commissions do not impose similar universal service obligations on incumbent LECs and competitive ETCs,” the FCC has directed the Joint Board to reexamine the entire “system for resolving requests for ETC designations under section 214(e)(2) of the Act.”<sup>268</sup> The entire enterprise has dissolved into one of those intractable disputes where “[n]obody is happy and everybody has appealed.”<sup>269</sup>

How, then, should the FCC and the Joint Board address the supposed problem of excessive growth in demands for high-cost support within the Universal Service Fund? I turn now to that question. Much of the reaction to this issue is based on a fundamental misunderstanding. The designation of multiple ETCs in rural high-cost areas is scarcely exerting financial pressure on the federal Universal Service Fund. Careful scrutiny reveals that CETC designations lag far behind other drivers of growth in the USF. Moreover, relative to incumbent ETCs, CETCs as a class receive a trivial share of federal support for telecommunications service in high-cost areas. The FCC should retain its current policy of excluding presumed financial pressure on the USF from the consideration of ETC designation petitions. Including that factor would fatally undermine the public interest in competitive neutrality and rural-urban parity.

## 2. The True Relevance of the Financial Factor

Any recommendation to freeze high-cost support levels within the USF must begin with a reconsideration of the FCC’s most refusal to adopt such a proposal. In its 2001 *MAG Plan Order*, the FCC addressed the Rural Task Force’s concern that “excessive growth in the fund” might occur “if incumbent carriers lose many lines to competitive eligible telecommunications carriers, or if competitive eligible telecommunications

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266. *Id.*

267. *See November 2002 Order*, 17 F.C.C.R. at 22,646-47.

268. *Id.* at 22,647.

269. *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1153 (2d Cir. 1978); *Empire Seafoods, Inc. v. Anderson*, 398 F.2d 204, 207 (5th Cir. 1968).

carriers add a significant number of lines.”<sup>270</sup> The Task Force had described CETC capture of lines previously served by an ILEC as a driver of growth in the fund:

[A]s an incumbent “loses” lines to a competitive eligible telecommunications carrier, the incumbent must recover its fixed costs from fewer lines, thus increasing its per-line costs. With higher per-line costs, the incumbent would receive greater per-line support, which would also be available to the competitive eligible telecommunications carrier for each of the lines that it serves.<sup>271</sup>

The FCC, however, rejected the Task Force proposal to freeze high-cost support levels. It characterized the likelihood that a CETC would “captur[e] a substantial percentage of lines from the incumbent” as “speculative.”<sup>272</sup> Among the plan’s “significant drawbacks,” the Commission reasoned that freezing high-cost support would create “disincentives to infrastructure investment by rural carriers.”<sup>273</sup> The most compelling justification for the Commission’s refusal to freeze high-cost support, however, lay in the ability of incumbent carriers to transform putative concern over the solvency of the fund into a legal bludgeon against competition. The *MAG Plan Order* recognized that a freeze in support could “hinder . . . competitive entry into rural study areas by creating an additional incentive for incumbents to oppose the designation of eligible telecommunications carriers.”<sup>274</sup>

The FCC has given this argument far more credence than it deserves. The unbroken string of demands to freeze high-cost support within the USF launched during the prologue to the *First Report and Order* and never abandoned since represents a prime instance of the process by which diehard partisans try to turn even outrageous myth into history through relentless repetition. Portraying CETC designations as a one-way ratchet forcing growth in the federal Universal Service Fund has no basis in law or in fact. Even if a state commission could lawfully consider, in connection with its determination of the public interest under section 214(e)(2), the financial impact of ETC designations on the USF, a proper understanding of the underlying financial mechanism demonstrates that growth in the fund through competitive entry into rural markets is probably speculative and almost assuredly trivial. Worse, freezing the USF would contradict the

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270. *MAG Plan Order*, *supra* note 76, at 11,326.

271. *Id.*

272. *Id.*

273. *Id.* at 11,294; *see also id.* at 11,297 (“at this time, the costs of adopting the Rural Task Force’s proposal to freeze high-cost loop support . . . would significantly outweigh the potential benefits”); *id.* at 11,326 (expressing the Commission’s concern that a freeze might “have had the unintended consequence of discouraging investment in rural infrastructure”).

274. *Id.* at 11,326.

principle of portability, which represents one of the most salutary, technology-forcing characteristics of the universal service program. The real driver of growth in the high-cost component of the USF is the FCC's continued use of an embedded-cost methodology for subsidizing incumbent rural carriers. As long as the Commission retains that methodology, no rule purporting to control USF growth by retarding the pace of CETC designations or curbing the total amount of high-cost support can be compatible with the public interest.

Proposals to freeze high-cost support abound, but honest statements of the fiscal impact of competitive entry on the Universal Service Fund are relatively rare. Accuracy in describing this real-life phenomenon varies inversely with the intensity with which interested parties advocate measures purportedly intended to remedy the supposed crisis in fund growth. High-cost support trails other sources of growth in the USF by a wide margin. According to data collected by the National Exchange Carrier Association, support programs for schools and libraries, rural health care, and interstate access have more than doubled the size of the USF since 1998.<sup>275</sup> By contrast, the high-cost support and lifeline programs have increased by only 30 percent.<sup>276</sup>

Within the portion of the Universal Service Fund dedicated to high-cost support, CETCs account for a trifling share. During the third quarter of 2002, competitive carriers received approximately \$14 million out of \$803 million in total high-cost support disbursed by the Fund.<sup>277</sup> The resulting 1.8 percent share of total high-cost support is admittedly higher than the 0.4 percent share realized by CETCs during the first quarter of 2001 (when CETCs received approximately \$2 million out of \$638 million in high-cost support).<sup>278</sup> The numerical imbalance between competitive versus incumbent ETCs is equally remarkable. Among approximately 1,400 ETCs in the United States, only 45 are competitive carriers.<sup>279</sup> Within the subclass of CETCs, only 15 are mobile wireless providers; the remainder are competitive local exchange companies.<sup>280</sup> In other words, a roll call of ETCs in the United States would report a class consisting of roughly 97 percent incumbent ETCs, 2 percent CETCs using wireline or

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275. See MICHAEL J. BALHOFF, THE RLEC MONITOR, VOLUME 6, at 8 (Winter 2003) (quarterly report published by Legg Mason Wood Walker, Inc., including regulatory commentary by the National Exchange Carrier Association).

276. See *id.*

277. See Fed.-State Joint Bd. on Universal Serv., 17 F.C.C.R. 22,642, 22,643-44 (2002); Comment on Certain of the Comm'n's Rules Relating to High-Cost Universal Serv. Support & the ETC Designation Process, 18 F.C.C.R. 1941, 1947 (2003) [hereinafter *Joint Bd. Pub. Notice*].

278. See Federal-State Joint Bd. on Universal Serv., 17 F.C.C.R. 22,642, 22,244 (2002); *Joint Bd. Pub. Notice*, 18 F.C.C.R. at 1947.

279. See *Joint Bd. Pub. Notice*, 18 F.C.C.R. at 1947.

280. See *id.*



fixed wireless platforms, and 1 percent CETCs providing mobile wireless service.

Although the debate over subsidized rural telephony has somehow subordinated incumbent carriers' overwhelming share of the USF to the supposed contribution of competitive ETC designations to allegedly unsustainable growth in the fund, the truth remains that incumbent ETCs continue to receive more than 98 cents on the federal high-cost support dollar. Focusing on "empirical data" rather than protectionist rhetoric strongly "accentuate[s] the unfairness" of "impos[ing] a [potential] restraint on 100%" of competitive carriers in high-cost areas solely because of the ability of the earliest waves of entrants to capture 2 percent of federal universal funds dedicated to this segment of the market.<sup>281</sup> Meanwhile, cries of excessive growth and the accompanying demands for regulatory retribution issue forth from a class of carriers who outnumber their most dreaded competitors by nearly 100-to-1. The striking disparity between allegations of out-of-control growth and the modest magnitude of actual growth suggests that incumbent carriers and state regulators sympathetic to their cause are engaging in potentially anticompetitive manipulation of the rules governing ETC designation and universal service financing.

Moreover, not all growth within the USF is equally worrisome from a public policy perspective. Growth attributable to economic development in rural areas and to increased consumer demand for telecommunications and advanced services is hardly objectionable. If anything, this sort of growth indicates that universal service is achieving one of its goals, that of extending equality of economic opportunity from America's cities into the nation's countryside. By contrast, USF growth driven by the rising average costs of delivering telecommunications service over a wireline network may reflect the needless diversion of public money to sustaining obsolete facilities. In other words, support paid to wireless carriers tends to contribute to benign or even desirable growth in the USF. By contrast, to the extent that a larger amount of universal service financing is being disbursed to cover rising average costs incurred by incumbent ETCs, such growth may give rise to legitimate policy concerns. Blame for such deleterious growth, however, cannot be fairly laid at the feet of competitive wireless entrants into high-cost markets. Again, incumbent carriers' calls to control growth in federal universal service obligations take no account of these subtleties, which upon closer examination provide no support for fearing (let alone curbing) wireless entry.

Any freeze in high-cost support would eviscerate a fundamental principle of universal service under the Telecommunications Act: portability. The FCC's rules contemplate that CETC capture of customers

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281. *Craig v. Boren*, 429 U.S. 190, 213-14 (1976) (Stevens, J., concurring).

from an ILEC should trigger a concomitant transfer of universal service support from the ILEC to the CETC: "A competitive eligible telecommunications carrier shall receive universal service support *to the extent that the competitive eligible telecommunications carrier captures the subscriber lines of an incumbent local exchange carrier . . . or serves new subscriber lines in the incumbent LEC's service area.*"<sup>282</sup> This regulation renders "the universal service subsidy [ ] portable so that it moves with the consumer, rather than stay with the incumbent LEC, whenever a customer makes the decision to switch local service providers."<sup>283</sup> The regulatory virtue of portability should not be transmogrified through legal misinterpretation into a fiscal vice that purportedly menaces the liquidity of the federal universal service support fund.

Proponents of a support freeze are correct in one respect: wireless entrants are capturing subscribers from wireline incumbents. The FCC has recognized the increased profile of wireless carriers in the telecommunications market.<sup>284</sup> Wireless-for-wireline substitution is quickening its pace. In its most recent study of the phenomenon, the FCC acknowledged "growing evidence that consumers are substituting wireless service for traditional wireline communications."<sup>285</sup> The FCC cited one study estimating "that, by the end of 2001, wireless had displaced 10 million access lines."<sup>286</sup> Another study cited by the FCC "estimates that 2 million households replaced an access line with a wireless phone in the first six months of 2001" alone.<sup>287</sup> "[A]s of November 2001, 1.2 percent of households in the United States indicated that they had only wireless phones."<sup>288</sup> True to the grander "purpose[s] of universal service," portability of support within the federal universal service program "benefit[s] the customer, not the carrier."<sup>289</sup>

To treat wireless-for-wireline substitution as a threat to the solvency of the Universal Service Fund and therefore as a public interest consideration *against* competitive entry would turn deregulation on its head. Under no

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282. 47 C.F.R. § 54.307(a) (2002) (emphasis added).

283. *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000).

284. See Annual Report & Analysis of Competitive Market Conditions with Respect to Commercial Mobile Servs., 16 F.C.C.R. 13,350, 13,438 & n.24 (2001); Annual Report & Analysis of Competitive Market Conditions with Respect to Commercial Mobile Servs., 15 F.C.C.R. 17,660, 17,788 & n.20 (2000).

285. Annual Report & Analysis of Competitive Market Conditions with Respect to Commercial Mobile Servs., 17 F.C.C.R. 12,985, 13,017 (2002) [hereinafter *Seventh CMRS Report*]; accord Verizon Wireless's Petition for Partial Forbearance, 17 F.C.C.R. 14,972, 14,979 (2002).

286. *Seventh CMRS Report*, 17 F.C.C.R. at 13,017.

287. *Id.* at 13,017 n.214.

288. Comment on Certain of the Comm'n's Rules Relating to High-Cost Universal Serv. Support & the ETC Designation Process, 18 F.C.C.R. 1941, 1948 (2003).

289. *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 621 (5th Cir. 2000); accord *MAG Plan Order*, *supra* note 76, at 11,257-58.

circumstances should the cost-effectiveness of a prospective ETC's service offerings should be counted as a *negative* in the applicable public interest analysis. The FCC has observed, squarely to the contrary, that a competitive ETC's ability to extend service to a remote area at low cost should be considered a strong contribution to the public interest:

[T]o the extent that a competitive eligible telecommunications carrier offering an alternative to wireline technology can extend service to a remote . . . area at a substantially lower cost than a wireline carrier, we believe that it is a more economically efficient use of federal universal service funds to create incentives, in the first instance, for the lower-cost provider to provide the service.<sup>290</sup>

The FCC has found “no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise rates, or reduce service quality to consumers.”<sup>291</sup> “To the contrary,” the FCC has reasoned, “competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service.”<sup>292</sup>

### 3. Proposed Solutions

The FCC has already adopted the proper approach to controlling the USF growth that presumably stems from the CETC designation process. The FCC should retain its current approach of conducting proceedings designed to review a single ETC petition for a specific market without regard to concerns over allegedly excessive growth in the high-cost component of the Universal Service Fund. On the other hand, if excessive growth in the demand for high-cost support within the USF is considered a valid query within the public interest analysis required by section 214(e)(2) and (6), the FCC should address that purported problem in a fashion that is consistent with the public interest and the grander procompetitive purposes of the 1996 Act.

The legal solution to this predicament lies in breaking the fatal combination of an embedded-cost methodology with the consideration of fiscal pressure on the USF as an element of the public interest. The simplest expedient lies in retaining the FCC's current policy and confirming what sound principles of statutory interpretation already dictate: refusal to consider the financial impact of ETC designations on the high-

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290. *In re W. Wireless Corp.*, 15 F.C.C.R. 12,208, 12,241 (2000).

291. *In re W. Wireless Corp.*, 16 F.C.C.R. 48, 57 (2000).

292. *Id.*

cost component of the Universal Service Fund. In the long run, however, the FCC cannot continue to defer what it has promised since 1997 but has never delivered: computing incumbent carriers' support for delivering service to high-cost areas strictly according to forward-looking costs. The legitimate public interest considerations of competitive neutrality, technological evolution, and consumer choice dictate no less.

The real source of the problem is not competitive entry, but rather the continued use of an embedded cost methodology for computing high-cost support to incumbent carriers in rural areas. The FCC's ongoing policy of basing high-cost support to all ETCs in rural areas on the incumbent ETC's embedded costs serves as the primary driver of entry-related growth in the high-cost component of the USF. In designing every other aspect of the federal universal service program, "the FCC decided to use the 'forward-looking' costs . . . of a carrier."<sup>293</sup> This commitment to a regulatory methodology based "on the costs an efficient carrier would incur (rather than the costs the incumbent carriers historically have incurred)" supplies a powerful tool for "encourag[ing] carriers to act efficiently."<sup>294</sup> A regulatory strategy with any pretense to economic efficiency must focus prospectively on costs to the exclusion of embedded costs.<sup>295</sup> Because the "historical investments" in legacy networks are "sunk costs" and have no relevance to contemporary business decisions, prices in a competitive market react solely "to current costs."<sup>296</sup> The need to ignore historic costs in making "current pricing decisions," whether through pure market-based competition or regulatory mechanisms designed to remedy competitive imperfections, is "particularly significant in industries such as telecommunications which depend heavily on technological innovation."<sup>297</sup>

With respect to the delivery of universal service support for high-cost areas, the law falls far short of economic ideals. In its *First Report & Order*, the FCC adopted a methodology using embedded cost in favor of "a cost model or other means of determining forward-looking economic cost . . . to calculate . . . support" to carriers "serving rural high cost areas."<sup>298</sup> At that time, the Commission acknowledged "that calculating high cost

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293. *Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 407 (5th Cir. 1999).

294. *Id.*

295. See DALE LEHMAN & DENNIS WEISMAN, *THE TELECOMMUNICATIONS ACT OF 1996: THE "COSTS" OF MANAGED COMPETITION* 66 (2000).

296. *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 615 (5th Cir. 2000); see also ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* § 7.1, at 199 (2d ed. 1992) (observing that sunk costs "are usually visible," but arguing nevertheless that "they should always be ignored when making economic decisions"); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.1, at 7 (3d ed. 1986) (observing that "cost to an economist is a forward-looking concept" and that costs already incurred "do not affect decisions on price and quantity").

297. *MCI Communications Corp. v. Am. Tel. & Tel. Corp.*, 708 F.2d 1081, 1116-17 (7th Cir. 1983).

298. *First Report & Order*, *supra* note 65, at 8934.

support based on embedded cost is contrary to sound economic policy.”<sup>299</sup> The FCC “conclude[d] that the 1996 Act’s mandate to foster competition in the provision of telecommunications services in all areas of the country and the principle of competitive neutrality” would eventually “compel” the Commission “to implement support mechanisms that will send accurate market signals to competitors.”<sup>300</sup>

The FCC originally anticipated “that forward-looking support mechanisms that could be used for rural carriers . . . will be developed within three years” of the 1997 release of the *First Report & Order*.<sup>301</sup> The long awaited transition to a forward-looking methodology for computing high-cost support to rural carriers, however, has not yet occurred. Despite frequently reciting its intention to wean rural ILECs off of an embedded cost methodology and to align this system with the forward-looking cost methodology that governs nonrural carriers, the FCC has not yet implemented this strategy.<sup>302</sup> Under current FCC rules, that methodology will remain in place until 2006.<sup>303</sup>

The embedded cost methodology acts as a far more effective driver of growth in the USF than does competitive entry.<sup>304</sup> Ever since the *First Report and Order*, the Joint Board and the FCC have consistently recognized how the current funding method is wedded to incumbent ETC costs.<sup>305</sup> Worse, continued reliance on embedded costs increases the cost of universal service in a most deleterious fashion. It drives USF growth upward in order to compensate incumbent carriers whose average costs are rising in lock-step with their loss of market position to their competitors. The potential of this approach to divert precious public funds toward sustaining obsolete physical plant and to discourage the deployment of more efficient technology may be the gravest source of inefficiency within the universal service program.

A forward-looking mechanism is neither alien to the FCC’s experience with universal service administration nor theoretically unattainable. A forward-looking mechanism is precisely what the FCC has adopted for calculating and distributing high-cost support to nonrural carriers.<sup>306</sup> In the rural context, Chairman Michael K. Powell has

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299. *Id.* at 8935.

300. *Id.*

301. *Id.* at 8936.

302. See *MAG Plan Order*, *supra* note 76, at 11,259; Federal-State Joint Bd. on Universal Serv., 14 F.C.C.R. 20,432, 20,439 (1999), *aff’d in part & rev’d in part sub nom. Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001); *First Report & Order*, *supra* note 65, at 8899, 8936.

303. See *MAG Plan Order*, *supra* note 76, at 11,258-29.

304. See *id.* at 11,360 (separate statement of Powell, Chairman).

305. Compare *First Report & Order*, *supra* note 65, at 8932-34, 8944-45 with Comment on Certain of the Comm’n’s Rules Relating to High-Cost Universal Serv. Support & the ETC Designation Process, 18 F.C.C.R. 1941, 1948 (2003).

306. See 47 C.F.R. § 54.309 (2002).

advocated “a permanent support mechanism, based on forward-looking costs,” or at any rate a “measure of costs” more appropriate than incumbent carriers’ per-line embedded costs, that would more effectively “ensure that the rural high-cost loop fund grows no larger than is truly necessary to accomplish its purpose.”<sup>307</sup> If proponents of a moratorium on CETC designations were truly concerned about relieving financial pressure on the USF, as opposed to using regulatory process to fend off competitive challenges to incumbent carriers, they would advocate an immediate conversion to a funding formula that uses forward-looking costs and promotes full portability of USF support.

One final look at the Telecommunications Act confirms the regulatory imprudence and legal impossibility of treating financial pressure on the USF as a component of the public interest. Indulging this favorite argument of incumbent rural telephone companies would unleash a lethal combination of current regulatory policy with the economic characteristics of a wireline telecommunications network. Under current legal and economic conditions, incumbent wireline carriers hold the first ETC designation in virtually every rural area. The calculation of support according to these incumbents’ embedded cost guarantees that *every* additional ETC designation in an overlapping market will increase the financial demands on the Universal Service Fund, even if only by a trivial amount. As long as the FCC retains its embedded-cost methodology for computing high-cost support to rural IETCs, allowing allegations of excessive fiscal pressure on the USF to influence interpretations of the term “public interest” would logically foreclose further ETC designations whenever a competitive carrier would capture at least some lines previously served by the incumbent.

Imposing a *de facto* moratorium on competitive ETC designations would destroy the 1996 Act’s agenda for preserving and advancing universal service. Treating financial pressure on the USF without regard to its magnitude, its policy implications, or its origins in regulatory decisions made consciously for the benefit of incumbent carriers as a factor against competitive entry is inimical to every other element of the public interest. As a matter of statutory interpretation, federal universal service policy cannot simultaneously retain an embedded-cost methodology for computing high-cost support to incumbent rural carriers while interpreting the term “public interest” (within the meaning of section 214(e)(2) and (6)) to prohibit ETC designations that increase financial demands on the Universal Service Fund. As long as the embedded-cost mechanism remains in force, the designation of a competitive ETC forces some growth in the

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307. *MAG Plan Order*, *supra* note 76, at 11,360 (separate statement of Powell, Chairman).

USF as soon as the entrant captures at least one line previously served by the incumbent.

Any reading of section 214(e)(2) and (6) in which the presumed financial impact of additional ETC designations is deemed to be detrimental to the public interest will lead to an absurd result. Under any legal interpretation of the term “public interest” in which the supposed pressure of additional ETC designations on the high-cost component of the federal Universal Service Fund constitutes a serious public cost, categorically *no* ETC petitions beyond those confirming the eligibility of an incumbent rural telephone company can ever be approved. An interpretation of the term “public interest” that forecloses all ETC designations beyond those confirming the status of the incumbent carrier as a rural community’s first and only eligible telecommunications carrier simply cannot be correct.

Shutting off *all* high-cost funding for competitive carriers in rural areas would devastate the public interest foundations of federal universal service policy: competitive neutrality, rural-urban parity, and portability of support. Such a catastrophic interpretation of the Telecommunications Act and its “public interest” standard stems from a seemingly innocuous combination: a regulatory policy to postpone the implementation of a forward-looking financing methodology, coupled with wireline-to-wireless migration in a competitive and consumer-driven marketplace. As long as there is some wireless-to-wireline migration, which is inevitable in a competitive, consumer-driven, and technologically volatile marketplace, there are no realistic circumstances under which a competitive carrier can successfully secure designated as an ETC. That the prevalence of wireline-to-wireless migration the epitome of competition and technological evolution could affirmatively undermine a wireless carrier’s quest for ETC status conclusively establishes the perniciousness and ultimate illegality of this approach.

At an absolute minimum, the FCC should retain its current approach of excluding concerns over fund growth from proceedings designed to designate an ETC for a specific market. On the other hand, the Joint Board has begun proceedings to address incumbent carriers’ longstanding demands for tangible measures designed to curb growth in the high-cost component of the USF. It may be politically impossible for the FCC to take no action whatsoever. Any measure the FCC ultimately adopts must remain faithful to countervailing universal service principles such as competitive neutrality, rural-urban parity, and portability of support. Even if high-cost support is in fact exerting unsustainable pressure on the Universal Service Fund, and even if a desire to limit such growth may lawfully be considered a component of the public interest, the FCC must not cap high-cost funding or adopt other policies that may retard

competitive entry into rural markets. Nor should the Commission amend its rules to vary support according to an ETC's technological platform or to cap the amount of high-cost support available to CETCs. To the extent that the FCC wishes to change its existing rules, it should consider instead the possibility of basing high-cost support, on a competitively neutral basis, upon the costs of a lowest-cost provider of supported telecommunications services to a rural market.

If anything, the pending Joint Board proceeding and the FCC's response to the Board's eventual recommendations will enable the FCC to address the real root of the problem. Because Commission's continued adherence to an embedded-cost mechanism is the principal driver of growth in the USF's high-cost support obligations, the FCC should adopt a forward-looking methodology for computing universal service support in high-cost areas, wholly decoupled from incumbent carriers' costs. Such a methodology has been contemplated, but never implemented, since the inception of the 1996 Act's universal service program. The FCC should amend its rules to apply the same forward-looking methodology for computing high-cost support to IETCs in rural and nonrural service areas alike.

#### IV. PREEMPTING STATE REGULATION OF WIRELESS TELEPHONY

A significant number of controversies over universal service support for rural telephony involve a pitched technological conflict: incumbents' legacy wireline networks versus the wireless platforms favored by many aspiring CETCs. State regulators' natural propensity to favor incumbents and their technological platforms demands attention to a special provision of federal law that targets this precise problem. Section 332 of the Communications Act, as amended, provides that "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."<sup>308</sup> Congress adopted this preemptive measure as part of the Omnibus Budget Reconciliation Act of 1993<sup>309</sup> in order "to promote rapid deployment of a wireless telecommunications infrastructure."<sup>310</sup> By their nature, wireless communications markets transcend not only state boundaries but also the geographic footprints of legacy wireline communications networks.<sup>311</sup> "The plain language of this legislation manifests a clear Congressional intent to

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308. 47 U.S.C. § 332(c)(3)(A) (2000).

309. Pub. L. No. 103-66, § 6002(b)(2)(A), 107 Stat. 312, 393 (1993).

310. Rates of Wholesale Cellular Serv. Providers in Conn., 10 F.C.C.R. 7025, 7025 (1995), *review denied sub nom.* Conn. Dep't of Pub. Util. Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

311. See *Ball v. GTE Mobilnet*, 81 Cal. App. 4th 529, 534, 96 Cal. Rptr. 2d 801, 804 (2000); H.R. REP. NO. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.



preempt the field” of wireless telecommunications regulation “with respect to rates and market entry.”<sup>312</sup>

The 1993 amendment imposed “regulatory symmetry” along technological lines rather than jurisdictional distinctions based on inter-versus intrastate carriage or commercial versus private service.<sup>313</sup> Congress sought to “promote investment in . . . wireless infrastructure by preventing burdensome and unnecessary state regulatory practices.”<sup>314</sup> Preemption under section 332 takes special aim at two of the likeliest obstacles to rapid rollout of wireless services: (1) the anticompetitive advantages inherent in incumbent local exchange carriers’ ownership of the physical communications networks<sup>315</sup> and (2) anticompetitive regulatory intervention by state and local officials.<sup>316</sup>

The broad, preemptive provision of section 332 triggers a cascade of interrelated statutory definitions. Federal law defines “commercial mobile service” as “any mobile service . . . that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public.”<sup>317</sup> “Private mobile service” refers merely to that class of “mobile service . . . that is not a commercial mobile service or the functional equivalent of a commercial mobile service.”<sup>318</sup> For its part, “mobile service” is defined as “a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves.”<sup>319</sup> In turn, “[t]he term ‘mobile station’ means a radio-communication station capable of being moved and which ordinarily does move.”<sup>320</sup>

Section 332 raises a formidable barrier to state-law regulation of entry by commercial mobile radio service (CMRS) providers and of the rates they charge. First, strictly as a matter of statutory language, the mobility of each individual communication unit is not essential to the definition of “mobile service.” The definition of mobile service includes, without regard to the involvement of “mobile stations,” “any service for which a license is required

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312. *Bryceland v. AT&T Corp.*, 122 F. Supp. 2d 703, 707 (N.D. Tex. 2000).

313. *See Conn. Dep’t of Pub. Util. Control v. FCC*, 78 F.3d 842, 846 (2d Cir. 1996).

314. *Implementation of Sections 3(n) & 332 of the Communications Act Regulatory Treatment of Mobile Servs.*, 9 F.C.C.R. 1411, 1421 (1994), *reconsideration dismissed in part and denied in part*, 15 F.C.C.R. 5231 (2000); *accord Tenore v. AT&T Wireless Servs.*, 136 Wash. 2d 322, 335-36, 962 P.2d 104, 110 (1998).

315. *See U.S. West Communications, Inc. v. Wash. Utils. & Transp. Comm’n*, 255 F.3d 990, 992 (9th Cir. 2001).

316. *See, e.g., Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 49-50 (D. Mass. 1997).

317. 47 U.S.C. § 332(d)(1) (2000); *see also* 47 C.F.R. § 20.3 (2002).

318. 47 U.S.C. § 332(d)(3) (2000).

319. *Id.* § 153(27).

320. *Id.* § 153(28).

in a personal communications service established pursuant to the proceeding entitled 'Amendment to the Commission's Rules to Establish New Personal Communications Services' (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.<sup>321</sup> Nor is it clear that actual motion is a *sine qua non* of the definition of "mobile station," for the FCC's definition simply describes "mobile station" as "[o]ne or more transmitters that are capable of operation while in motion."<sup>322</sup> In addition, the relevant legislative history suggests that Congress did not intend to exclude fixed wireless service from the statutory definition of mobile service. The original Senate bill in what ultimately became the Omnibus Budget Reconciliation Act of 1993 expressly excluded fixed wireless service from the definition of mobile service. The House-Senate Conference, however, adopted the House of Representatives' definition of mobile service, which did not expressly exclude fixed wireless service.<sup>323</sup> When Congress "specifically consider[s] and reject[s]" a legislative proposal, as it did during the debates over the 1993 amendment, that act of legislative rejection provides one of the "clear[est] indication[s] of congressional agreement" with the opposite legal proposition.<sup>324</sup>

Finally, the FCC has recognized that a service need not be "mobile" in a narrow sense in order to be regulated as commercial mobile radio service. The FCC has expressly stated that fixed services provided by a CMRS carrier on an auxiliary, ancillary, or incidental basis are regulated as CMRS.<sup>325</sup> Seeking "to offer some flexibility to licensees providing CMRS services," the FCC has "consistently stated" that its approach to CMRS regulation would enable wireless carriers to "offer[]" a broad array of services,

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321. *Id.* § 153(27); see also *GTE Mobilnet v. Johnson*, 111 F.3d 469, 472 (6th Cir.1997) (including "cellular telephone service" within § 153(27)'s definition of "mobile service"); *Gilmore v. Southwestern Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 920 n.3 (N.D. Ill. 2001) (same).

322. 47 C.F.R. § 22.99 (2002).

323. See H.R. CONF. REP. NO. 103-213, at 497 (1993).

324. *Runyon v. McCrary*, 427 U.S. 160, 174-75 (1976); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting))); *NLRB v. Catholic Bishop*, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting) (arguing that a court commits "a particularly transparent violation of the judicial role" when it fails to acknowledge how "Congress itself considered and rejected a[n] . . . amendment" similar to the court's interpretation of a statute).

325. See 47 C.F.R. § 22.323 (2002); Petition for a Declaratory Ruling that the Basic Universal Serv. Offering Provided by W. Wireless in Kan. is Subject to Regulation as Local Exch. Serv. [hereinafter *Kan. Preemption Order*], 17 F.C.C.R. 14,802, 14,817 (2002); Amendment of the Commission's Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Serv., 15 F.C.C.R. 14,680, 14,685 (2000); Amendment of the Commission's Rules to Permit Flexible Serv. Offerings in the Commercial Mobile Radio Serv., 11 F.C.C.R. 8965, 8968-69 (1996) [hereinafter *First CMRS Flex Order*]; Implementation of Sections 3(n) & 332 of the Communications Act Regulatory Treatment of Mobile Serv., 9 F.C.C.R. 1411, 1424 (1994), *reconsideration dismissed in part and denied in part*, 15 F.C.C.R. 5231 (2000).

including services that could potentially extend, replace, and compete with wireline local exchange service.<sup>326</sup> Whether a specific “radio-communication station” actually “moves” is immaterial.<sup>327</sup> Within its regulatory framework for CMRS, the FCC has elected to “includ[e] ‘wireless local loop,’ [which] may be delivered using a system architecture *that is mobile or fixed, or that combines mobile and fixed components.*”<sup>328</sup> By operation of section 332, fixed wireless service that is regulated by the FCC as CMRS lies beyond the reach of state regulators.

Fairly read, part 22 of the FCC’s regulations and the FCC’s orders facilitating flexible use extend the federal regulatory structure for CMRS to all forms of radio communication, whether mobile or fixed, that share facilities used by a CMRS licensee at least in part to provide mobile services. In the *Kansas Preemption Order*, which arose in response to a dispute over the regulatory status of basic universal service offered over a wireless platform, the FCC reasoned that service “provided over the same spectrum and infrastructure that [a CMRS licensee] uses to provide conventional mobile cellular service, and is in all respects the same as conventional mobile cellular service” qualifies as incidental CMRS service, without regard to “customer equipment.”<sup>329</sup> If a petitioner for CETC designation provides both fixed wireless and conventional mobile services on shared infrastructure, that fact should suffice to trigger section 332 and its preemptive effect on state laws that directly or indirectly affect either rates or entry among wireless carriers.

Since rendering the *Kansas Preemption Order*, the FCC has eliminated section 22.323 of its rules pursuant to a mandatory biennial review of its rules.<sup>330</sup> The *Kansas Preemption Order*, however, recognized that elimination of section 22.323 would nevertheless leave “the criteria specified in [that] rule . . . relevant to [the] evaluation of whether [a fixed wireless] service is properly classified as incidental.”<sup>331</sup> The streamlining of the FCC’s rules therefore has no impact on the legal classification of Petitioners’ fixed wireless service offerings as auxiliary, ancillary, or incidental CMRS.

The North Dakota Supreme Court has also addressed this issue. In *Consolidated Telephone Co-operative v. Western Wireless Corp.*,<sup>332</sup> an incumbent local exchange company refused interconnection with a

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326. *First CMRS Flex Order*, 11 F.C.C.R. at 8969.

327. 47 U.S.C. § 153(28) (2000).

328. *First CMRS Flex Order*, 11 F.C.C.R. at 8969 (emphasis added).

329. *Kan. Preemption Order*, 17 F.C.C.R. at 14,817.

330. See Public Mobile Servs. & Personal Communications Servs., 67 Fed. Reg. 77,175, 77,191 (Dec. 17, 2002) (removing 47 C.F.R. § 22.323, effective Feb. 18, 2003).

331. 17 F.C.C.R. at 14,817 n.108.

332. 637 N.W.2d 699 (N.D. 2001).

competitor offering wireless residential service.<sup>333</sup> The ILEC defended its action by arguing that its competitor could not lawfully serve residents without a certificate of public convenience and necessity issued by the North Dakota Public Service Commission.<sup>334</sup> The PSC disagreed, reasoning that the wireless competitor was providing commercial mobile radio service and therefore lay beyond the reach of public utility regulation under North Dakota law.<sup>335</sup>

On appeal, the ILEC “argued [that] the ‘tellular’ device” used by the wireless carrier’s customers was “not CMRS under the federal statutory definition because it ordinarily does not move and was not intended for mobile use.”<sup>336</sup> Acknowledging the FCC’s numerous, repeated declarations that “telecommunications services provided through dual-use equipment . . . having both fixed and mobile capabilities fall within the statutory definition of ‘mobile service’ under the Communications Act,”<sup>337</sup> the North Dakota Supreme Court declared itself powerless “to declare invalid, or simply to ignore,” the FCC’s conclusive interpretation of federal law.<sup>338</sup> The North Dakota decision in *Consolidated Telephone* is in complete accord with extensive federal precedent barring state regulatory commissions, state courts, and even federal district courts from reinterpreting, challenging, or otherwise waging “collateral attacks” on FCC regulations and orders.<sup>339</sup>

Indeed, a tellular unit of the sort at issue in *Consolidated Telephone* would probably satisfy the definition of mobile service by any standard. In the *Kansas Preemption Order*, the FCC ruled that “BUS [basic universal service] terminal equipment ‘ordinarily does move,’ consistent with the second prong of the definition of mobile station.”<sup>340</sup> The FCC specifically “reject[ed] the . . . argument that meeting the second prong of the statutory test requires an affirmative showing that customers usually or typically use the wireless unit while mobile.”<sup>341</sup> Refusing to adopt a regulatory approach so dependent upon “the subjective and varying behavior of particular

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333. *See id.* at 701.

334. *See id.*

335. *See id.*

336. *Id.* at 706.

337. *Id.* at 709.

338. *Id.* at 707.

339. *See, e.g.,* *United States v. Neset*, 235 F.3d 415, 420-21 (8th Cir. 2000); *U.S. West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000); *In re FCC*, 217 F.3d 125, 139 (2d Cir. 2000); *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Ark. Pub. Serv. Comm’n*, 738 F.2d 901, 906-07 (8th Cir. 1984), *vacated and remanded on other grounds*, 476 U.S. 1167 (1986); *see also* *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (acknowledging the exclusive jurisdiction of the federal courts of appeals to review the declaratory rulings, policies, practices, and regulations of the FCC).

340. *Kan. Preemption Order*, 17 F.C.C.R. at 14,811-12 (citing 47 U.S.C. § 153(28)).

341. *Id.* at 14,812.

customers” as to be “unworkable,” the FCC concluded instead that “the statutory test is met if mobile operation is an inherent part of the service offering that is reasonably likely and not an extraordinary or aberrational use of the equipment.”<sup>342</sup>

The wireless access unit at issue in the *Kansas Preemption Order* could “be ‘picked up, placed in a car, rolled down the road and taken to the barn.’”<sup>343</sup> That unit was “specifically designed to operate while in motion with the same seamless hand-off capability as any other cellular phone.”<sup>344</sup> Quite typically, a wireless calling plan specifically allows a customer to use the unit anywhere within a local calling area that is roughly equivalent to a rural school district and that includes, in most instances, several rural communities. Moreover, a tellular unit can typically be used with any of a wireless carrier’s rate plans, which enables any customer to elect a roaming option. The *Kansas Preemption Order* treated the existence of a wireless carrier’s “express provision for mobility [within a local service area] and roaming in the terms of service” as strong evidentiary support for the proposition that the calling unit provided by the carrier “ordinarily does move.”<sup>345</sup> The *Kansas Preemption Order* thus eviscerates purported efforts to distinguish a wireless carrier’s basic universal service offering from “traditional” cellular offerings.

Section 332’s reach should not be underestimated. The scope of preemption under section 332 is not limited to direct regulation of a carrier’s rate of return. Instead, section 332 also preempts any action that has the “effect” of regulating the rates charged by a CMRS carrier.<sup>346</sup> State action is unlawful if it would “necessarily force [a CMRS carrier] to do more than required by the FCC.”<sup>347</sup> Federal law “specifically insulates . . . FCC decisions” affecting CMRS carriers—including the conscious federal policy of leaving CMRS rates to market forces instead of regulation—from interference under state law.

Any state-law requirement that CMRS providers file a tariff as a condition of ETC designation constitutes rate regulation in blatant violation of section 332. A state commission cannot deflect this provision’s preemptive effect by describing the tariff as one ostensibly filed solely for “disclosure purposes.” Any tariffing requirement opens the door to the very type of state regulation of CMRS providers that federal law forbids. “The tariff-filing requirement is . . . the heart of the common-carrier section of

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342. *Id.* at 14,813.

343. *Id.* at 14,811.

344. *Id.* at 14,812.

345. *Id.* (observing further that the terms of Western Wireless’s basic universal service offering entitle customers to “unlimited use within Western Wireless’ local service area as well as roaming on Western Wireless’ system outside the local service area”).

346. *Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983, 989 (7th Cir. 2000).

347. *Id.*

the Communications Act . . . . [R]ate filing [has historically been] Congress's chosen means of preventing unreasonableness and discrimination in charges . . . ."<sup>348</sup>

If forced to file a tariff, a prospective CETC would be bound by its terms. The carrier would be barred from negotiating terms that deviate from those contained in the tariff. Moreover, even if the carrier could change its rates by filing a revised tariff with the state commission, the commission's ability to revoke ETC designation based on the tariffed rates violates section 332.<sup>349</sup> A state commission would act just as unlawfully if it conditioned Universal Service Fund eligibility on other terms and conditions of service contained in a tariff filed by a carrier seeking ETC status. Any "claim for inadequate services" raised by state regulators under color of patrolling a wireless carrier's "disclosure-only" tariff necessarily violates section 332, since "[a]ny claim for excessive rates can be couched as a claim for inadequate services and vice versa."<sup>350</sup> Rates, which "do not exist in isolation" from services, "have meaning only when one knows the services to which they are attached."<sup>351</sup> In sum, section 332's prohibition of state regulation of rates and entry by CMRS providers is broad enough to preempt not only direct ratemaking by a state, but also all other actions under color of state law that "raise the issue of whether [a customer] receive[s] sufficient services in return for the" rates charged by a CMRS provider.<sup>352</sup>

Section 332 works in concert with the general preemption provisions of the Telecommunications Act. Section 253 of the Communications Act, added by the 1996 amendments, generally preempts any "State or local statute or regulation, or other State or local legal requirement," that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>353</sup> The Act's preemption provision, however, contains a savings clause that safeguards "the ability of a State to impose, on a competitively neutral basis and consistent with section 254 . . . , requirements necessary to preserve and

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348. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *accord* *Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 223 (1998); *see also* *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("The duty to file rates . . . and the obligation to charge only those rates have always been considered essential to preventing price discrimination and stabilizing rates." (citation omitted)).

349. *See Cent. Office*, 524 U.S. at 228; *Bastien*, 205 F.3d at 989.

350. *Cent. Office*, 524 U.S. at 223; *accord Bastien*, 205 F.3d at 988; *Bryceland v. AT&T Corp.*, 122 F. Supp. 2d 703, 709 (N.D. Tex. 2000).

351. *Cent. Office*, 524 U.S. at 223; *accord* *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994); *see also Maislin Indus.*, 497 U.S. at 126 ("The duty to file rates . . . and the obligation to charge only those rates have always been considered essential to preventing price discrimination and stabilizing rates." (citation omitted)).

352. *Gilmore v. Southwestern Bell Mobile Sys., Inc.*, 156 F. Supp. 2d 916, 924 (N.D. Ill. 2001).

353. 47 U.S.C. § 253(a) (2000).

advance universal service.<sup>354</sup> By the same token, section 253 also provides that “[n]othing in this section shall affect the application of section 332(c)(3) . . . to commercial mobile service providers.”<sup>355</sup> At a minimum, this interlocking cluster of provisions consisting of a general preemption provision, a savings clause for state-law measures related to universal service, and an exception to the savings clause reinstating preemption under section 332 in favor of CMRS providers means that the general preemption provision of section 253 governs an ETC designation proceeding, without the safe harbor otherwise granted to state regulations that are “necessary to preserve and advance universal service.” Any narrower interpretation of sections 253 and 332 would provide all the satisfaction that arises when “two different persons seek to drive one car.”<sup>356</sup> When federal officials determine, as Congress and the FCC have in other contexts, that restrictive regulation of a particular area is not in the public interest, “States are not permitted to use their police power to enact such a regulation.”<sup>357</sup>

The most obvious interpretation of the savings clause in section 253, however, is that preemption under section 332 of state-law regulation of commercial mobile radio takes priority over state-law administration of the ETC designation process. Section 253 specifically addresses the role of state regulators in designating ETCs. Subsection (f) provides that “[i]t shall not be a violation” of federal law and its preemptive effect on state law “for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1)” regarding ETC designation.<sup>358</sup> But the Act further specifies that “[t]his subsection shall not apply . . . to a provider of commercial mobile services.”<sup>359</sup> Quite plainly, the savings clause sheltering ETC designation proceedings under state law has no application when a CMRS carrier is at issue, and preemption under sections 332 and 253 applies with full force.

## V. CONCLUSION

When cast strictly in the abstract, as too many questions of law tend to be, the case for federalism seems facile and obvious. Indeed, asserting the need for federal supremacy over local subsidiarity seems downright un-American. Legal paeans to “Our Federalism”<sup>360</sup> “conjure[] up images of

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354. *Id.* § 253(b).

355. *Id.* § 253(e).

356. *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 364 (1986).

357. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984); *accord Ray v. Atl. Richfield Co.*, 435 U.S. 151, 178 (1978).

358. 47 U.S.C. § 253(f) (2000).

359. *Id.*

360. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard.”<sup>361</sup> These longings are not toxic *per se*; great judicial careers have been built on little more than a “simple belief in the things [others] . . . laugh at: motherhood, marriage, family, flag, and the like.”<sup>362</sup> But the mindless habit of “proclaim[ing] [federalism’s] virtues out of the universal desire for self-justification” can transmogrify the conventional defense of American federalism into fanatic dedication to small-scale enterprise, self-sufficiency, and local government.<sup>363</sup>

Whatever value these objectives may have in other contexts, their pursuit undermines the development of rational telecommunications policy. In terms of rhetoric and reason, most defenses of federalism in a regulatory setting are reminiscent of an FCC order that ran into Richard A. Posner’s judicial buzzsaw a decade ago:

The Commission’s majority opinion . . . consists [mostly] of boilerplate, the recitation of the multitudinous parties’ multifarious contentions, and self-congratulatory rhetoric about how careful and thoughtful and measured and balanced the majority has been in evaluating those contentions and carrying out its responsibilities. Stripped of verbiage, the opinion, like a Persian cat with its fur shaved, is alarmingly pale and thin.<sup>364</sup>

What we forget is that questions of good governance and of economic performance ultimately have empirical answers. “Like all other questions, the question of how to promote a flourishing society [should] . . . be answered as much by experience [as by] theory.”<sup>365</sup>

True to that wisdom, the Colorado school has proposed to reconcile decentralization with deregulation through concrete case studies. After examining the implementation of the universal service program established by the Telecommunications Act of 1996, this article has extended the Colorado school’s enterprise but reached the opposite conclusion. State-initiated implementation of high-cost support under the federal universal service program, particularly the determination by state regulatory commissions of the public interest in the designation of competitive eligible

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361. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 906 (1994).

362. THE SUPREME COURT UNDER EARL WARREN 152 (Leonard W. Levy ed., 1972) (quoting Justice Potter Stewart’s observations on the “great strength” behind Chief Justice Earl Warren).

363. Rubin & Feeley, *supra* note 361, at 908.

364. *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1050 (7th Cir. 1992) (Posner, J.).

365. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1347 (1988).



telecommunications carriers in rural areas, demonstrates the inherent incompatibility of decentralization with deregulation. Far from promoting market-based solutions to competitive failures, the devolution of power solidifies the grip of dominant incumbents and converts state law into a weapon against competitive entry.

The great shame is that rural and high-cost markets stand to benefit more, not less, than other markets in the transition from conventional public utility regulation to market-based alternatives. "Deregulation . . . contains its own technology policy, and a successful one at that."<sup>366</sup> The public interest in subsidizing rural telephony rests in aggressive measures to roll out advanced telecommunications infrastructure and services to the geographic and economic limits of the republic. This aspect of universal service depends on two overarching factors. The public interest rests squarely on *competitive neutrality* (including neutrality as between carriers and technological neutrality) and on the *portability* of subsidies among eligible carriers.<sup>367</sup> The failure to honor either principle, let alone both, betrays Congress's vision that rural Americans should attain technological and economic parity with their urban counterparts. The "[d]esignation of competitive ETCs promotes competition and benefits consumers in rural and high-cost areas by increasing customer choice, innovative services, and new technologies."<sup>368</sup> Portability, for its part, converts USF support into a catalyst of technological innovation by enabling competitive ETCs to exert pressure on ILECs.<sup>369</sup> In concert with competitive neutrality, portability helps ensure that "the market, and not local or federal government regulators, determines who shall compete for and deliver services to customers."<sup>370</sup>

Telecommunications law, like the closely related field of antitrust law, protects "*competition, not competitors.*"<sup>371</sup> Like that of the Sherman Act, the purpose of the Telecommunications Act "is not to protect businesses from the working of the market."<sup>372</sup> Neither the Telecommunications Act nor any other regulatory law has ever been interpreted to require the government to protect incumbent firms against changes in the marketplace "or to restore values that have been lost by the operation of economic

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366. Chen, *supra* note 54, at 967.

367. See *First Order & Report*, *supra* note 65, at 8933.

368. W. Wireless Corp., 16 F.C.C.R. 48, 55 (2000).

369. See *First Report & Order*, *supra* note 65, at 8932.

370. Alenco Communications, Inc. v. FCC, 201 F.3d 608, 616 (5th Cir. 2000).

371. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original); *accord, e.g., Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338 (1990); *cf. Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) (Posner, J.) (intimating that the antitrust laws should not "hold[] an umbrella over inefficient competitors").

372. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993); *see also id.* ("The law directs itself . . . against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.").

forces.”<sup>373</sup> The pecuniary preferences of incumbent service providers cannot negate the public interest in regulatory approval of additional providers.<sup>374</sup> Regulators should not confuse the lawful “requirement of sufficient support for universal service within a [competitive] market” with the anticompetitive and unlawful demand that incumbent carriers be given “a guarantee of economic success.”<sup>375</sup> When ILECs reflexively oppose competitive carriers’ petitions for ETC designation in order to secure regulatory “protection from competition,” such resistance represents “the very antithesis of the [Telecommunications] Act.”<sup>376</sup>

This is the sense in which regulation by state and local authorities is “probably the source of most of the anticompetitive restraints remaining in the American economy.”<sup>377</sup> At the dawn of the 1996 Act, a former Federal Communications Commissioner predicted that state regulators would be “relentless in challenging FCC efforts to introduce competition” because of “a well-grounded fear” that federal success in deregulation “would mean higher local residential service rates.”<sup>378</sup> I would amend Glen Robinson’s prescient insight in only one respect: the relentless resistance of state regulators to deregulation has stemmed from a well-grounded fear that deregulation means lower market shares for incumbent carriers. Andrew Koppelman has shown, with great verve, that decentralization in constitutional law can never be decoupled from a substantive civil rights agenda, one that favors entrenched social power.<sup>379</sup> In this economic realm, the observation holds true. Decentralization translates, jot for jot, into massive resistance against deregulation and competition.

Perhaps we can be saved by theory, after all. Public choice theory systematically predicts that regulation dissolves into incumbent protection and that regulatory capture is likelier and more tenacious on a local scale. Political blackmail, no gentler term would be accurate, reaches its apex when local firms seek legal protection against outside competition.<sup>380</sup>

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373. *Mkt. St. Ry. Co. v. R.R. Comm’n of Cal.*, 324 U.S. 548, 567 (1945); see also *id.* at 554 (distinguishing the regulation of a common carrier’s rates from the distinct “problem[s]” faced by “an enterprise that has passed its zenith of opportunity and usefulness, whose investment already is impaired by economic forces, and whose earning possibilities are already invaded by competition from other” firms and technologies).

374. *Cf. W. Union Tel. Co. v. FCC*, 665 F.2d 1126 (D.C. Cir. 1981).

375. *Alenco*, 201 F.3d at 625.

376. *Id.* at 622.

377. Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1253 (1995).

378. Glen O. Robinson, *The New Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 308 (1996).

379. See Andrew Koppelman, *How “Decentralization” Rationalizes Oligarchy: John McGinnis and the Rehnquist Court*, 20 CONST. COMMENT. (forthcoming 2003).

380. See ROBERT LAWRENCE & ROBERT LITAN, *SAVING FREE TRADE* 23-24 (1986); cf. KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL*

Armed with these insights, we can define the political economy of telecommunications in elegantly descriptive and accurately prescriptive terms. When implemented locally, telecommunications law systematically favors local incumbents. To retain any hope of true competition, federal telecommunications law must exert deregulatory discipline from above. The essential insight of Federalist Paper No. 10 remains valid: because it is impossible and undesirable to force the entire nation to share “the same opinions, the same passions, and the same interests,”<sup>381</sup> the road toward rational regulation begins with the establishment of a large polity that embraces them all.<sup>382</sup>

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ECONOMIES 62 (1995) (“If patriotism is . . . the last refuge of the scoundrel, wrapping outdated industry in the mantle of national interest is the last refuge of the economically dispossessed.”).

381. THE FEDERALIST NO. 10, at 55 (James Madison) (Edward Meade Earle ed., 1937).

382. See *id.* at 60-61.

