

**“COOPERATIVE FEDERALISM” GONE  
WRONG:  
THE IMPLEMENTATION OF THE  
TELECOMMUNICATIONS ACT OF 1996**

ROY E. HOFFINGER\*

INTRODUCTION

The phrase “cooperative federalism” has been used to refer to “federal programs that charge state agencies – as well as federal ones – with the responsibility of interpreting and implementing federal law.”<sup>1</sup> Because cooperative federalism entails “shared federal and state government responsibility,”<sup>2</sup> it raises difficult and continuing questions about the extent to which the responsibilities of these government entities overlap, and how this overlap may best be accommodated to achieve the program’s objectives.

A relatively recent example of a cooperative federalism statute is the Federal Telecommunications Act of 1996 (“the Act”).<sup>3</sup> Among other things, the Act imposes a duty on incumbent local telephone companies (“Incumbent Local Exchange Carriers” or ILECs) to share portions of their networks with carriers seeking to compete with them, thereby promoting a form of retail marketing competition for telecommunications services.<sup>4</sup> Because this and other duties imposed by

---

\* Partner, Perkins Coie LLP. The author acknowledges and express his gratitude to Phil Weiser, Don Friedman and Jon Nuechterlein for their comments on prior drafts. However, the views expressed herein are solely the author’s.

1. Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND L. REV. 1, 3 n.6 (1999) [hereinafter Weiser, *Telecomms. Reform*].

2. John D. Edgcomb, *Cooperative Federalism and Environmental Protection: The Surface Mining Control and Reclamation Act of 1977*, 58 TUL. L. REV. 299 (1983).

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

4. See 47 U.S.C. §251(2003); 47 U.S.C. §251 (2003); see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Order & Report*, 11 F.C.C.R. 15,499 (1996) [hereinafter *Local Competition Order*] (For a detailed description of the Act); Iowa Utils. Bd. v. F.C.C., 219 F.3d 744, 749-50 (8th Cir. 2000) *aff’d in part, rev’d in part* by Verizon Communications, Inc. v. F.C.C., 535 U.S. 467, 476-77 (2002).

the Act are not self-executing, the Act expressly relies upon the Federal Communications Commission ("FCC") and state public utility commissions to fill in the details and otherwise enforce its provisions. In particular, the Act confers on the FCC the same broad and continuing rulemaking authority that it enjoys with respect to interstate telecommunications under the Communications Act of 1934, and expressly requires the FCC to make some of the fundamental determinations left open by the Act's text. In contrast to this broad grant of rulemaking authority, the Act assigns to state commissions the task of arbitrating, based on the Act and FCC regulations, disputes that arise during negotiations between particular ILECs and competitors.

The *federal* Act thus assigns to the *federal* agency the principal role in the continued development of the nation's nascent local competition policy. Over the last several years, however, state commissions have assumed the predominant role in making policy under the Act. The FCC has acquiesced in and even occasionally endorsed outright this shift in responsibilities. Prior to and contemporaneous with these developments, commentators have urged that an enhanced role for state commissions under the Act be encouraged by changing settled law denying deference to state commission decisions during federal judicial review.<sup>5</sup> Commentators have also contended that federal courts have, in practice if not by rule, deferred to the decisions of state commissions, and that deference is "inevitable" under regulatory statutes addressed to complex matters of technology and pricing such as the Act.

This article shows that the shift toward policymaking by state commissions with respect to local telecommunications competition is contrary to the Act's design, and has imposed enormous litigation and other costs on the industry and consumers as carriers, regulators and other parties engage in interminable debate in multiple fora over the appropriate source and content of proposed rules and decisions. These costs will be increased if, as urged by others, federal courts defer to the decisions of state commissions. To the extent that federal courts have tended to defer to state commission decisions in interpreting or applying the Act, the appropriate response is not to change the law to conform to this practice, but to refer to the FCC, under the doctrine of "primary jurisdiction," issues of law and policy when the proper resolution is in doubt.

Under this view, state commissions will continue to play an important role in the Act's implementation with regard to fact-finding and application of the Act and the FCC's regulations to particular

---

5. See Weiser, *Telecomms. Reform*, *supra* note 1, at 27; Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001) [hereinafter Weiser, *Federal Common Law*].

situations during arbitrations of agreements between ILECs and new entrants. In addition, state commissions can fully participate in resolving interpretive and policy issues arising under the Act by filing comments in rulemaking and other proceedings conducted by the FCC. The FCC can and should be expected to pay special attention to those comments in view of the substantial knowledge and experience accumulated by state commissions in arbitrating and enforcing agreements between ILECs and new entrants.

Part I of this article begins with a brief overview of the Act and the FCC's initial attempt to add substantive content through exercise of its rulemaking authority, with special attention to the interpretation of the Act's requirement that ILECs share portions or "network elements" of their networks at "cost-based" rates. It continues with a discussion of the reaction by state commissions to the FCC's efforts, including their legal challenge to the FCC's jurisdiction to adopt local competition rules, and the Supreme Court's rejection of that challenge. Part I concludes with some important examples of the FCC's subsequent inaction and outright refusal, in the face of continued political backlash by its state commission counterparts, to resolve critical local competition issues, notwithstanding the Supreme Court's unequivocal confirmation and endorsement of its statutory authority to do so. The result, in the words of the FCC's Chairman, is that there is "no meaningful federal policy" with respect to local competition for telecommunications, notwithstanding Congress's adoption of the Act and delegation to the FCC.<sup>6</sup>

Part II addresses legal and policy arguments regarding the enhanced role assumed by state commissions in interpreting and implementing the Act, the corresponding diminution in the FCC's role, and the arguments in favor of deference by federal courts to legal and policy determinations by state commissions. In particular, part II shows that litigation of the same issues before fifty-one state commissions, the same number of federal district courts, and up to eleven courts of appeals is wasteful at best, and denies to the industry the certainty and uniformity needed to attract investment and compete efficiently in regional, national and even international markets. Moreover, continued deference to state commission decisions during federal judicial review, whether by rule or practice, will accelerate the diminution of the FCC's rule, ensuring the absence of any federal standards beyond those incorporated in the vague text of the Act.<sup>7</sup> Finally, encouraging state "experimentation" through

---

6. Chairman Michael Powell, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (Feb. 20, 2003), *available at* [http://hraunfoss.fcc.gov/edoc\\_public/attachments/DOC-231344A3.pdf](http://hraunfoss.fcc.gov/edoc_public/attachments/DOC-231344A3.pdf).

7. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (observing that "it would be a gross understatement to say that the 1996 Act is not a model of clarity"). That observation

deference would also threaten achievement of the Act's primary objective, competition between different networks, and not merely "synthetic competition" in the marketing of services provided over the same network.<sup>8</sup>

## I. COOPERATIVE FEDERALISM UNDER THE ACT SINCE 1996

### A. *The Act and the FCC's Local Competition Order*

The preamble to the Act states that its purposes are to "reduce regulation" of and "promote competition" for telecommunications services.<sup>9</sup> Toward those ends, section 252 of the Act requires the incumbent LECs to enter into agreements ("interconnection agreements") with other telecommunications carriers ("Competitive Local Exchange Carriers," or "CLECs"). These agreements may implement one or more of the entry mechanisms provided for under section 251: (1) linking (*i.e.*, "interconnection" of) the parties' networks, allowing customers served by the network of one party to place and receive calls to and from customers served by the network of the other party ("facilities-based competition");<sup>10</sup> (2) the provision by the ILEC at a "wholesale discount" of its retail telecommunications services to the CLEC for resale;<sup>11</sup> and (3) the leasing by the ILEC to the CLEC, at "cost-based" rates, of "loops," "switches," and other network elements, ("UNEs") for the provision of competing telecommunications services (a different form of resale).<sup>12</sup>

The definitions and standards under the Act's key provisions vary between vague, incomplete and nonexistent.<sup>13</sup> For example, the Act requires the leasing at "cost-based" rates of UNEs that are either "necessary" for the provision of competing telecommunications services, or those without which the provision of such services would be

---

underscores the need for some entity to clarify and otherwise add content to the many ambiguities and gaps to the Act's provisions.

8. *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 123 S. Ct. 1571 (2003).

9. 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).

10. 47 U.S.C. §251(a), §251(c)(2) (2003).

11. *Id.* at §251 (c)(4).

12. *Id.* at §251(c)(3); §251 (d)(1) (2003). "Loops" are the wires that connect homes, offices and other customer premises to the remainder of the carrier's network. Individual calls are delivered to "switches" located in LEC wire centers. Switches are essentially a type of computer processor that route calls to their destinations. The wires and other facilities used to transmit calls between LEC switches, and between LEC switches and long distance switches, are known as "transport" facilities.

13. *See AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

"impaired."<sup>14</sup> The Act neither defines nor provides a standard to determine costs, necessity, or impairment. To fill these and other gaps the Act directs the FCC to adopt regulations "implementing" these and other requirements within six months of its enactment.<sup>15</sup> The Act also assigns to state commissions the task of arbitrating disputes between individual ILECs and CLECs in the event they are unable to agree upon the rates, terms and conditions to be included in their interconnection agreement,<sup>16</sup> subject to review by federal district courts at the request of "an aggrieved party."<sup>17</sup> In addition to the Act's substantive provisions, the FCC's regulations form the backdrop for negotiations and, if necessary, state commission arbitrations of interconnection agreements between ILECs and CLECs.<sup>18</sup>

In its landmark *Local Competition Order*, the FCC adopted an initial set of regulations intended to answer, or at least to begin to answer, the many questions left open by the Act.<sup>19</sup> In addition to specifying the UNEs that ILECs must lease to CLECs, the FCC adopted and required state commissions to use a particular "forward-looking" methodology – Total Element Long Run Incremental Cost ("TELRIC") – in arbitrating disputes over UNE rates.<sup>20</sup> Significantly, the FCC stated that it would "augment" and "refine" its TELRIC and other local competition rules "on an ongoing basis to address additional or unanticipated issues."<sup>21</sup>

In the FCC's proceeding to adopt local competition rules, many state commissions as well as their trade association, the National Association of Regulatory Utility Commissioners ("NARUC") argued that the FCC lacked legal authority to adopt rules that would bind state commissions in arbitrating disputes under the Act. The states also argued that the FCC should decline to exercise any authority it might

---

14. 47 U.S.C. §251(c)(3), §251(d)(2); 47 U.S.C. §252(d)(1) (2003). A finding of "necessity" is a prerequisite to requiring the incumbent LEC to provide access to an element of its network that is "proprietary." The "impairment" standard applies to all other elements.

15. 47 U.S.C. §251(d)(1) (2003).

16. 47 U.S.C. §252(b) (2003).

17. See 47 U.S.C. §252(e)(6) (2003).

18. 47 U.S.C. §252(c)(1) (2003).

19. *Local Competition Order*, 11 F.C.C.R. 15,499 (1996).

20. "Forward-looking cost methodologies" are intended to measure replacement cost, as opposed to "historic," "embedded" or "book" costs. As a forward-looking methodology, TELRIC measures the cost of replacing the incumbent LEC's network (or more accurately, the features and functions provided to customers by the network) using the most efficient technologies, architectures and operating methods that are currently available, at today's prices, under conditions currently prevailing outside the network. See *Local Competition Order*, 11 F.C.C.R. at 15,515 (1996); *Verizon Communications, Inc. v. F.C.C.*, 122 S.Ct. 1646 (2002).

21. *Local Competition Order*, 11 F.C.C.R. at 15,535 (1996).

have, allowing the states to fill the resulting void.<sup>22</sup> In rejecting these arguments, the FCC emphasized the importance of national rules in reducing “uncertainty” on the part of the industry, regulators and capital markets, preventing “widely disparate state policies” that could hinder the development of local competition, and ensuring “consistent federal court decisions” upon review of specific state commission rulings.<sup>23</sup>

The FCC’s decision to adopt national rules to govern the pricing and other provisions of the 1996 Act outraged state regulators and NARUC, prompting them to file an appeal that was heard by the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit first stayed and then vacated many of the FCC’s regulations, including the TELRIC regulations. The court reasoned that the UNE and other provisions of the Act largely concerned intrastate telecommunications, the regulation of which Congress had left to the states in language undisturbed by the 1996 Act.<sup>24</sup>

The Supreme Court reversed the Eighth Circuit’s decision in *Iowa Utilities Board v. FCC*.<sup>25</sup> The Court there held that section 201(b) of the Communications Act of 1934, to which the 1996 was an amendment, “*explicitly* gives the FCC jurisdiction to make rules governing the matters to which the 1996 Act applies.”<sup>26</sup> The Court emphasized that its holding was not merely faithful to the Act’s language, but also consistent with Congress’s decision to “federalize” the regulation of local telecommunications competition:

[T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions’ participation in the administration of the new federal regime is to be guided by federal agency regulations. If there is any ‘presumption’ applicable to this question, it should arise from the fact

---

22. Initial Comments of National Association of Regulatory Utility Commissioners, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98 at 6-20 (filed May 16, 1996) [hereinafter *NARUC Comments*].

23. *Local Competition Order*, 11 F.C.C.R. at 15,558-59.

24. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793-800 (8th Cir. 1997), *rev’d* *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366. (Relying on Section 2(b) of the Communications Act of 1934, the Court reasoned that the Act was insufficient to overcome the presumption created by Section 2(b), except in the few instances where it specifically provided for FCC regulations (*e.g.*, section 251(d)(2)).

25. 525 U.S. 366 (1999).

26. *Id.* at 380 (1999) (emphasis in original).

that a federal program administered by 50 independent state agencies is surpassing strange.<sup>27</sup>

### *B. FCC Regulation of Local Competition Since 1996*

The Supreme Court's decision thus ended the debate – or at least the legal debate – whether the FCC or state commissions would take the lead in further defining competition policy in local telecommunications markets. State commissions, however, continued to strongly oppose the FCC's exercise of the authority confirmed by the Court. The FCC's response to these developments has been largely to refrain from further exercise of the authority conferred by Congress and upheld by the Supreme Court to lead the continued development of national local competition policy. Specifically, contrary to its promise in the *Local Competition Order* to "augment" and "refine" its rules to address "additional issues," the FCC has rarely done either. The FCC's silence has created a void that state commissions have filled with their own visions of local competition policy.<sup>28</sup>

The FCC's silence has been especially conspicuous in the case of UNE pricing and TELRIC, the subjects as to which the FCC's assertion and exercise of jurisdiction most infuriated its state counterparts. An example is the FCC's refusal to address the merits of disputes between AT&T, MCI Worldcom, and Verizon regarding the interpretation and application of TELRIC. In return for the FCC's approval of the license transfers necessary to effectuate its proposed merger with NYNEX, Verizon's predecessor (Bell Atlantic) had agreed that the UNE rates in each of its states would be based upon "forward-looking" costs, which the FCC had defined in the *Local Competition Order* to mean TELRIC.<sup>29</sup>

---

27. *Id.*, at 378 n.6 (emphasis in original). Thus, according to the Court, once Congress decided to make local telecommunications competition the subject of federal law, the only "states' rights" issue left to be decided was whether ensuring adherence by state commissions to the new federal policies would be the responsibility of the FCC or federal courts, a "detail" that the Court found incapable of inspiring "passionate" debate. *Id.* Experience has shown, however, that absent FCC regulations applying the Act's broad concepts to particular situations, state commissions have enormous leeway to shape the Act to suit their own policy and political preferences, which very likely accounts for the great "passion" that this debate has aroused both before and after the Court's decision. *See also*, Weiser, *Telecomms. Reform*, *supra* note 1; *Level 3 Communications, LLC v. Pub. Util. Commis'n of Or.*, CV 01-1818-PA, slip op. (Or. Ct. App. Nov. 25, 2002).

28. There is no evidence that state commissions have made their local competition decisions reluctantly, and would have preferred that the FCC make these decisions instead. State commissions have rarely if ever called for FCC action with respect to local competition. This is not to be confused with state commissions urging the FCC to choose a particular resolution of an issue should their efforts to persuade the FCC to allow them to make the choice prove unsuccessful.

29. *See* Bell Atl./NYNEX, *Order*, 12 F.C.C.R. 19,985 (1997) (approving Bell Atlantic/NYNEX merger subject to conditions).

After the merger was approved, AT&T Corp. and MCI WorldCom filed formal complaints with the FCC under section 208 of the Communications Act alleging that Verizon had failed to comply with the merger condition on UNE rates.<sup>30</sup> During its proceeding on the complaints, the FCC was urged by state commissions to respect their decisions and not reach the merits of the complaints. The FCC ultimately refused to address any of the fundamental methodological disputes raised by the parties' extensive pleadings. Instead, the FCC found that allowing the prosecution of the complaints would interfere with the states' rate-setting processes, and dismissed the complaints based on principles of "comity."<sup>31</sup>

Most recently, in its *Triennial Review Order*, the FCC delegated to the states the responsibility for determining under the Act many of the UNEs to which ILECs must provide access to their competitors at cost-based rates.<sup>32</sup> This development is especially noteworthy, for the Act specifically provides that "the Commission" [*i.e.*, the FCC], not the states, shall make these determinations.<sup>33</sup> Following extensive lobbying by NARUC, state commissions and individual state commissioners, however, the FCC accepted the argument that state commissions would be better able to resolve the "factual" issues raised in its proceeding – a proposition disputed by the CLECs in prior proceedings on UNEs,<sup>34</sup> and by the ILECs in the Triennial Review proceeding.<sup>35</sup> Significantly,

---

30. 47 U.S.C. § 208 (2003).

31. AT&T Corp. v. Bell Atl. Corp. & MCI Telecomms. Corp. & MCI Metro Access Transmissions Servs., Inc. v. Bell Atl. Corp., *Memorandum Opinion and Order*, 15 F.C.C. R. 17,066 (2000). The FCC recently released a notice of proposed rulemaking initiating what it described as "its first comprehensive review of the rules applicable to the pricing" of network elements. Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, WC Docket No. 03-173, Notice of Proposed Rulemaking, FCC 03-224 (FCC), (released September 15, 2003), ¶ 1. In the NPRM, the FCC sought comment on proposals to modify and clarify its pricing rules in several significant respects. *Id.* at ¶ 9. It is reasonable to assume, based on their opposition to the FCC's initial decision to adopt pricing rules, and their continued opposition to other FCC rulemakings under the Act, that state commissions will, either themselves or through NARUC, strongly oppose the adoption of any modifications or clarifications that may constrain their discretion in setting rates for network elements.

32. Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 01-338 [hereinafter *Triennial Review Order*]. These include switching and "dedicated transport," which are transmission facilities within the telephone network dedicated to the use of a particular carrier or customer. By delegating to state commissions the decisions on the availability of the switching UNE, the FCC effectively delegated the decision whether ILECs must continue to provide the "UNE platform," which is the combination of UNEs that comprise an ILEC's local network in its entirety. In the FCC's proceeding, state commissions vehemently urged the FCC to allow them to decide the fate of the UNE platform.

33. 47 U.S.C. §251(d)(2) (2003).

34. See *infra* notes 67-68 and accompanying text.

35. *Id.*



both incumbent LECs and CLECs had argued that the outcome in each state would reflect its own "policy preferences," not "evidence" or "facts," regardless whether the FCC's delegation was accompanied by standards for states to apply.<sup>36</sup>

With the delegation of UNE decisions to state commissions, the regulation of local competition since 1996 has now come almost full circle. Although the Act was supposed to have "taken the regulation of local telecommunications competition away from the States" in favor of a new federal policy overseen by the FCC, we now have a regime where "state regulators set retail rates, state regulators set all wholesale rates, and state regulators determine what elements will be available."<sup>37</sup> As a result, there is no "meaningful federal policy" regarding local telecommunications competition.<sup>38</sup>

## II. HOW COOPERATIVE FEDERALISM SHOULD WORK IN THE IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT

Scholars<sup>39</sup> and regulators<sup>40</sup> have argued that an enhanced role for state commissions in interpreting the Act and developing and applying its policies is consistent with if not required by the Act, and will achieve greater benefits than if the states' role were more limited. Correlatively, it has been suggested that such a role should be encouraged by requiring

---

36. See *infra* note 67-68. In its Triennial Review Order, the FCC did not respond to these arguments except to note that the "federal guidelines" it had adopted would ensure that the states' "unbundling decisions are implemented "consistently with the Act's purposes" and "in a carefully targeted manner." *Triennial Review Order* at ¶ 189. The "guidelines to which the FCC refers are a laundry list of broadly defined criteria relevant to the economic feasibility of entering a market through means other than using an ILEC's facilities." *Id.* at ¶ 84-91. The Order offers little in the way of objective measurements to assess any single criteria, or formulae for weighing the criteria against one another. Thus, "states are free to do what they choose in weighting the [FCC's] economic criteria in divergent and subjective ways." Powell, *supra* note 6 at 8. Further, the FCC's Order also delegates to individual state commissions the responsibility for determining the geographic and customer "markets" to which the criteria are to be applied. See e.g., Triennial Review at 495; see also Powell, *supra* note 6 at 7 (noting "unheeled discretion" to define markets accorded to state commissions by *Triennial Review Order*). For these reasons, if there is any consistency in the outcome of state proceedings, it is more likely to be a function of their common policy "belief in the beneficence of the widest unbundling possible," rather than to adherence to a coherent federal policy reflected in the FCC's "guidelines" for unbundling. *USTA*, 290 F.2d 415, 427 (2002). See Letter from Joan Smith (NARUC) to Chairman Michael K. Powell (FCC), December 5, 2001 (conveying NARUC's support for the "universal availability of" the UNE-Platform).

37. Powell, *supra* note 6, at 3 (observing that the FCC's proceeding was "transformed into a battle not over what should be unbundled, but who should decide – this Commission or the states," and that "the role of the states dominated this proceeding").

38. *Id.*

39. See Weiser, *Telecomms. Reform*, *supra* note 1.

40. See, e.g., Robert B. Nelson, *Cooperative Federalism: The State Regulatory Perspective*, 2000 L. Rev. Mich. St. U. Det. C.L. 41 (2000).

federal courts to accord “Chevron-like” deference to the decisions of state commissions during judicial review.<sup>41</sup> The remainder of this article argues that a role for state commissions beyond fact-finding in the arbitration or enforcement process is not contemplated by the Act. According deference to the decisions of state commissions during judicial review, whether by rule or practice, would result in a further diminution of the FCC’s role, cementing in place or aggravating the debilitating uncertainty that currently plagues the industry, and could defeat or delay the attainment of facilities-based competition.

### A. *The Law and Congressional Intent*

The argument that Congress desired or at least accepted the possibility that states would make—and courts would affirm—fundamental yet divergent policy decisions under the Act is based entirely on section 252’s designation of state commission to arbitrate interconnection agreements.<sup>42</sup> This inherently circular argument reduces to the following proposition: Congress must have understood that state commissions would resolve fundamental policy issues in arbitrating interconnection agreements, because otherwise Congress would not have designated them as arbitrators.

This argument is undermined if not refuted by other provisions in the Act, and by judicial decisions that provided the backdrop against which Congress is presumed to have legislated. As a preliminary matter, it is most peculiar to infer from the appointment of state commissions to “arbitrate” disputes arising in negotiations of interconnection agreements that Congress intended to confer upon state commissions a major role in making federal policy. Arbitration proceedings typically call for the application of existing law and policy to a set of facts in an adjudicatory context.<sup>43</sup>

More fundamentally, the inference from the Act’s arbitration provisions that Congress expected the Act to be implemented through non-uniform policy determinations of state commissions is undermined if not foreclosed by the Act’s designation of the FCC as the principle

---

41. Weiser, *Telecomms. Reform*, *supra* note 1, at 9.

42. 47 U.S.C. §252(e) (2003).

43. In arbitrating interconnection agreements between CLECs and Verizon in Virginia, for example, the FCC’s Wireline Competition Bureau deemed it inappropriate to use the proceeding to extend existing law or precedent. *See* Pet. of WorldCom Pursuant to Section 252(e)(5) for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon and for Expedited Arbitration, Memorandum *Opinion and Order*, 17 F.C.C.R. 27,039, 31,635 (2002) [hereinafter *FCC Va. Arbitration Order*]. The Bureau conducted the arbitration after the Virginia commission, concerned about the prospect of having to defend its decisions in federal court under section 252(e)(6), declined to do so.

entity to adopt and revise regulations interpreting the Act and effectuating its underlying policies, and by the Act's provision to federal courts of exclusive jurisdiction to review state commission determinations. Section 251(d)(1) requires the FCC to adopt within six months of enactment regulations to guide the determinations that state commissions would be called upon to make in arbitration proceedings. In response to section 251(d)(1), the FCC adopted its *Local Competition Order*.<sup>44</sup> Subsequent regulations are authorized by section 201(b)'s grant of jurisdiction to the FCC to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act"—provisions that include sections 251 and 252.<sup>45</sup> The Act requires state commissions to ensure that arbitrated interconnection agreements comply with the FCC's local competition regulations.<sup>46</sup> These provisions evidence an expectation by Congress that state commissions would be governed by a significant body of FCC precedent, enhancing the prospects for uniformity.

In addition, the Act authorizes federal judicial review of interconnection agreements,<sup>47</sup> including the arbitration decisions reflected in the agreements, and expressly precludes review in state court.<sup>48</sup> These provisions are additional evidence that Congress ultimately expected consistency in the application of federal law, notwithstanding the participation by state commissions in the implementation process. When Congress considered and adopted the Act, it was "well settled that 'federal statutes are generally intended to have uniform nationwide application.'"<sup>49</sup> Correlatively, it was equally well settled that federal courts do not defer to the construction or interpretation of federal statutes by state agencies, even where the agency is performing a function authorized by Congress.<sup>50</sup>

In sum, the Act's broad delegation of responsibility to the FCC and federal courts, providing for control at both the front and back ends of the implementation process, is powerful evidence that Congress expected the evolution of federal telecommunications policy to be guided by federal entities, allowing for variations only as warranted by specific factual circumstances. If Congress had intended states to establish important yet divergent telecommunications policies, it would have given some indication other than merely providing for state commission

---

44. See *Local Competition Order*, 11 F.C.C.R. 15,499 (1996).

45. 47 U.S.C. §201(b) (2003). See *AT&T v. Iowa Utils. Bd.* 525 U.S. 366 (1999).

46. 47 U.S.C. §252(e)(2)(B) (2000).

47. See 47 U.S.C. §252(e)(6) (2003).

48. See 47 U.S.C. §252(e)(4) (2003).

49. Weiser, *Telecomms. Reform*, *supra* note 1, at 11 (quoting *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989)) (per curiam).

50. *Turner*, 869 F.2d at 141; *Perry v. Dowling*, 95 F.3d 231, 236 (2d Cir. 1996).

arbitration of disputes that arise in private negotiations of interconnection agreements.

*B. Policy Arguments Against an Expansive State Role and Judicial Deference*

The view that states should assume a major policy role in implementing the Act is likewise unsustainable even when factors other than Congressional intent and precedent are considered. An expansive policy role for the states, unchecked by either the FCC or federal courts, will (1) result in a patchwork of individualized rules leading to enormous inefficiencies in an industry that is national and even global in scope, (2) require that potentially every legal or policy issue arising under the Act be litigated before multiple state commissions and federal courts, leading to enormous uncertainty among carriers, investors and consumers, and (3) allow states to retain certain aspects of their legacy regulation even where incompatible with the Act's objectives.

Many carriers today desire to provide their services on a regional, national and even global basis. Medium and large business customers with locations in different states or countries frequently prefer to deal with a single carrier, under a single, integrated arrangement, to meet their telecommunications needs. A patchwork quilt of regulations that vary from state to state either forecloses or increases substantially the operating expenses of such carriers and hinders their efforts to meet the demands of multi-location customers. The adoption by different states of different rate structures (*i.e.*, the individual components of charges associated with a particular order) for the same network elements, for example, could require carriers to replace or undertake costly upgrades to their billing systems. These costs are either passed on to consumers in the form of higher prices, or absorbed by carriers at the expense of network upgrades necessary to provide broadband and other services.

A scheme that allocates most decision making authority under the Act to state commissions—whether by express delegation or FCC inaction—increases uncertainty at a time when the industry can least afford it. Such uncertainty, which is by far the most compelling reason to reject the expansive role that the FCC has allowed state commissions to assume, is not a function of any inherent superiority of federal over state agencies in formulating and implementing law and policy. The uncertainty is a function of decision making by multiple agencies, as opposed to a single one; greater certainty is provided by a *single* proceeding that results in a single decision by the FCC, rather than *fifty-one* proceedings before state commissions on the same issue.

Absent a controlling FCC regulation or decision, each issue must be decided by up to fifty-one state commissions, the same number of federal district courts, and eleven federal circuit courts of appeal. In addition to litigation costs, the "grea[t] uncertainty" inherent in such a process "frustrate[s] the ability of carriers to plan" their business strategies, hinders carriers in their efforts to "raise capital" to build, maintain and enhance their networks," and "complicate[s] negotiation of interconnection agreements," as the FCC explained in 1999 in refusing to delegate the unbundling determinations to the states.<sup>51</sup> It is thus hardly surprising that the share prices of ILECs, CLECs and even equipment suppliers materially declined when, four years later, the FCC announced that it was changing its position and delegating to state commissions the authority to make these determinations.<sup>52</sup> Investment analysts expressed "enormous uncertainty about the tele[communications] industry" resulting in "a very high level of risk," and urged investors to "move their funds to other industries."<sup>53</sup>

Finally, the absence of FCC decisions or regulations resolving particular issues, and stringent federal judicial review of state commission decisions, increases the risk that when faced with a potential conflict between the Act's pro-competitive deregulatory policies and legacy state regulation, state commissions will tailor their decisions to accommodate the latter at the expense of the former.<sup>54</sup> For example, potential new entrants in at least some local telecommunications markets face the prospect of competing for residential customers against subsidized or even "below-cost" incumbent LEC rates required by legacy regulations adopted by state legislatures or commissions.<sup>55</sup> In this circumstance, a state commission has three options when determining the rates ILECs may charge CLECs for UNEs used to provide competing services: (A) set cost-based rates for UNEs, as required by the Act, without adjusting

---

51. Implementation of the Local Competition Provisions of the Telecomms. Act of 1996, *Third Report and Order and Fourth Further Notice of Proposed Rule Making*, 15 F.C.C.R. 3696, 3768-70 (1999).

52. *Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Comm.: Hearing Before the House Subcomm. on Telecomms. and the Internet*, 108th Cong. (2003) (statement of Michael K. Powell, Chairman, F.C.C., quoting *Commerce Capital Markets, Telecom Regulation*, F.C.C. Triennial Highlights, 5 (2003)).

53. *Id.*; See also Telecommunications Reports, June 5, 2003 (reporting that survey of CEOs and finance officials "complained of uncertainty caused . . . by the decision to let state regulators determine the future availability of unbundled switching and the unbundled network element platform")

54. See *NARUC Comments*, *supra* note 22, at 20 (opposing FCC regulations because, *inter alia*, they might interfere with "existing State price cap regimes"); Nelson, *supra* note 40 (objecting to FCC rules interpreting the Act on the ground that they "could abrogate years of state commission actions").

55. See generally *USTA*, 290 F.3d 415, 422 (D.C. Cir. 2002).

the incumbent's retail rates; (B) set UNE rates below cost in order to induce competitive entry, without adjusting the incumbent's retail rates; or (C) set cost-based rates for UNEs, and adjust the incumbent's existing retail rates (*i.e.*, "rate rebalancing").

Option A (*i.e.*, setting UNE rates equal to cost), although faithful to the UNE pricing provisions of the Act, would not further the Act's objective of creating conditions necessary for local competition. Specifically, when wholesale prices are set higher than resale prices, competition through resale is infeasible. New entrants will not construct alternative facilities to compete against incumbent's retail rates that are set below cost. Option B (*i.e.*, setting UNE rates below cost) violates the Act's UNE pricing provisions *and* further reduces the incentives of new entrants to invest in alternative facilities. Nevertheless, Option B has some appeal to regulators due to its potential to induce "synthetic" resale "competition" through UNEs, at the expense of reduced incentives for investment in facilities by incumbents and new entrants, a harm that regulators may perceive as more remote than the "benefit" of additional resale competition.<sup>56</sup>

Only Option C, which includes rate rebalancing, is consistent with both the language and purposes of the Act. No one, however, has suggested that states have engaged in any significant rate rebalancing initiatives since the Act's adoption. Notably, the failure to rebalance retail local rates leaves in place historic state policies favoring the use of government regulation to prevent the operation of market forces that could otherwise drive prices to cost.<sup>57</sup> Significantly, in comments in the FCC's local competition proceeding, NARUC urged the FCC to reject the concept of federal pricing rules in favor of state commission rules that would "vary from State to State" in order to preserve "commission-brokered residential rate freezes and" and prevent the "disrupt[ion] of existing state price cap regimes."<sup>58</sup> The preservation of state monopoly regulation, however, is the very antithesis of federal policy, reflected in the Act, to "reduce regulation" and "promote competition."

---

56. See *USTA*, 290 F.3d at 424.

57. To be sure, the Act also codifies federal "universal service" policies served by "affordable" rates for telecommunications services. 47 U.S.C. § 254 (2003). But the Act does not mandate retention of existing or other retail rates, and contemplates the adoption of measures that would permit the attainment of universal service objectives while minimizing interference with market forces. In this regard, the FCC's failure to complete reform of universal service mechanisms has likely been a contributing factor in the states' failure to rebalance rates.

58. *NARUC Comments*, *supra* note 22, at 20.

*C. Policy Arguments in Favor of an Expansive State Role and Judicial Deference*

As noted above, proponents of an enhanced role for state commissions have urged federal courts to defer during judicial review to state commission interpretations and applications of the Act, analogizing to the deference given by the courts to federal agencies under *Chevron v. U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>59</sup> Under *Chevron*, federal courts are required to defer to the interpretation of a federal statute by the federal agency charged with its administration or enforcement, except when the agency's interpretation is contrary to the statute's plain meaning. Thus, in the telecommunications context, federal courts defer to the FCC's interpretations of federal statutes, including the Act, which it administers.<sup>60</sup> Consistent with pre-Act law refusing to defer to the interpretations of federal law by state agencies, federal courts have held uniformly that they will apply a *de novo* standard of review to non-factual determinations by state commissions under the Act.<sup>61</sup>

Proponents of delegation to state commissions and a deferential standard of federal judicial review contend that pre-Act precedent and the arguments against deference are outweighed by (1) the superior ability of state commissions to tailor implementation of the Act to local circumstances,<sup>62</sup> (2) the benefits of state "experimentation,"<sup>63</sup> and (3) limitations on the resources of the FCC and the ability of courts to address "policy" and "technical issues."<sup>64</sup> The proponents rarely specify, however, the nature of the "local circumstances" to which state commissions are supposedly better able to tailor implementation of the Act. To the extent that "local circumstances" include prevailing state and local regulatory conditions and policy preferences, their argument undermines the case for deference to state agencies. Otherwise, a state's legacy regulatory scheme could effectively preempt the objectives of the Act; as suggested in the preceding section.

It is more likely that the "local circumstances" to which the proponents of deference refer are factual. In this context, their argument

---

59. 467 U.S. 837, 842-45 (1984).

60. See, e.g., *Tex. Coalition of Cities v. FCC*, 324 F.3d 802 (5th Cir. 2003); *AT&T v. FCC*, 323 F.3d 1081 (D.C. Cir. 2003).

61. See, e.g., *Southwestern Bell Tel. Co. v. Public Utils. Comm'n of Tex.*, 208 F.3d 475, 482 (5th Cir. 2000); *AT&T v. Bell Atl.*, 197 F.3d 663, 668 (4th Cir. 1999); *US W. Communications v. MFS Intelnet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999).

62. Weiser, *Federal Common Law*, *supra* note 5, at 1699; see also Ed Petrini, *Federalism and Beyond: The Uncertain Nature of Federal/State Relationships in a Restructuring World* 5 RICHMOND J.L. & TECH. 5 (Fall 1998).

63. Weiser, *Federal Common Law*, *supra* note 5, at 1701-03.

64. *Id.* at 1724.

questions the wisdom of applying the same rule in both New York and Montana, for example, and how someone located in Washington D.C. could make rules for either locale.<sup>65</sup> One answer is that federal rules can be sufficiently flexible to accommodate genuine differences in facts. The FCC's TELRIC pricing rules permit, indeed require, states to account for differences in population density that may impact the costs to be considered in determining UNE rates.<sup>66</sup> In all events, differences in facts rarely if ever correspond to state borders. It is difficult to understand why, for example, a regulator located in Washington D.C. is any less able than a regulator in Atlanta, Georgia to consider population density in and other facts relevant to cost determinations in rural Georgia. If factual differences support a shift in decision-making authority under the Act away from the federal government, that shift should lead to county or even municipal regulation rather than state regulation – a shift that no one has proposed.

In all events, as both CLECs and ILECs have observed, different resolutions of the same issue by different state commissions are far more likely to reflect policy rather than factual differences. In opposing FCC delegation to the states of UNE determinations four years ago, AT&T explained that “[a]ny process that involves individualized decisions by state commissions would inevitably give free play to [state policy] differences, and would create a patchwork of decisions on the availability of network elements that would reflect not the application of the congressional standards to different sets of facts, but the application of radically different standards that would subvert the national policy established by Congress.”<sup>67</sup> More recently, in the FCC's UNE Triennial Review proceeding, several large ILECs specifically cautioned the FCC against permitting states to make their own ultimate determinations on the basis of “broad and subjective” factual criteria that could be manipulated to yield outcomes conforming to their individual policy preferences.<sup>68</sup> The observations of CLECs and ILEC alike suggest a

---

65. Petriani, *supra* note 62 (from statement of Mark J. Mathis, Vice President and General Counsel, Bell Atlantic Network Service).

66. Weiser, *Telecomms. Reform*, *supra* note 1, at 18.

67. Reply Comments of AT&T Corp., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at 57-58 (filed June 10, 1999). Significantly, during the FCC's recent Triennial Review proceeding, AT&T did an “about face” and supported delegation to the states. Not coincidentally, prior to AT&T's change of position, Michael Powell, who had expressed concerns about the impact on investment incentives of the FCC's existing UNEs rules, became FCC Chairman, while many states expressed support for retaining those rules.

68. See SBC Communications, Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Servs., Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri, *Memorandum Opinion and Order*, CC Docket No. 01-194, (2001); See Powell, *supra* note 6 (noting that the FCC's Triennial Review Order “provide[s] a laundry list of microeconomic criteria that a state may consider,



need for more rigorous review of factual determinations by state commissions, not deference to their legal or policy determinations.<sup>69</sup>

Another argument asserted in favor of a more expansive role under the Act for state commissions, and deference by federal courts to their decisions, is that states could then serve as "laboratories" free to "experiment," compete with, and learn from one another.<sup>70</sup> The principal response to that argument is that the "benefits" of such experimentation are outweighed by the uncertainty and other costs it creates, as described above. But the "experimentation" concept suffers from additional flaws.<sup>71</sup> An important premise of the "experimentation" argument is that if state commissions are accorded deference, they will resolve issues in the manner they believe will maximize the ability of their states to compete with each other for capital investment and jobs.<sup>72</sup> Yet proponents of a rule requiring such deference do not appear to have considered the potential impact on attainment of the Act's objectives and have ignored the possibility that such a rule may introduce bias toward CLECs, particularly non-facilities-based CLECs.

A state commission generally has far more control over investment decisions by ILECs than those by CLECs. A state commission cannot legally or practically *order* CLECs to enter the state, and their authority to order a CLEC already present to expand its offerings within the state is constrained by federal and state law,<sup>73</sup> and by practical limits on CLEC resources. The commission must instead *encourage* voluntary CLEC entry and expansion by offering inducements, often at the expense of ILECs. In contrast, a state commission need not resort to such indirect measures to secure investment in its state by its ILECs. For example, the commission can simply order ILECs to adhere to more stringent service quality standards, requiring additional service technicians or network upgrades. As a result of the asymmetry in its authority over ILECs and CLECs, a state commission is more likely to perceive its

---

but the list is not exhaustive and states are free at bottom to do what they choose"): Kathleen Q. Abernathy, F.C.C. Commissioner, Press Statement, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (Feb. 20, 2003) ("the decision [in the FCC's Triennial Review Order] to make only vague presumptive findings on switching impairment and to delegate virtually unlimited discretion to state commissions abdicates our statutory responsibility").

69. Weiser, *Federal Common Law*, *supra* note 5, at 1740.

70. *See id.* at 1701-03.

71. Preliminarily, no one has identified any federal obstacle prior to the Act to the adoption by a state of laws and regulations to promote competition for local telecommunications services. Indeed, many states claimed in the FCC's 1996 rulemaking proceeding that they had adopted their own measures intended to introduce or promote local competition. One might then ask why, if Congress were satisfied with the status quo, it bothered to adopt the Act.

72. Weiser, *Federal Common Law*, *supra* note 5, at 1700-01.

73. *See, e.g.*, 47 U.S.C. § 253 (2003).

decisions implementing the Act as having greater impact on its relative ability to attract investment by the latter. According deference to different state commission decisions on the same issue may further skew the results in favor of CLECs. Otherwise, a state commission that takes a more even-handed approach will place its state at a competitive disadvantage in attracting CLEC entry and investment.

Such a bias is also more likely to favor UNE-based (*i.e.*, resale) competition over facilities-based competition. In proceedings to establish UNE rates CLECs argue to state commissions that high rates will prevent them from entering or expanding their offerings within the state, while ILECs argue that low rates will discourage investment in new facilities by both ILECs and CLECs. UNE-based competition, however, can develop much sooner than facilities-based competition. Regulators, like most of the population at large, are not very patient. Accordingly, state commissions are likely to err on the side of setting UNE rates low in their “competition” for immediate results, delaying if not foreclosing the attainment of facilities-based competition, the Act’s ultimate objective.<sup>74</sup>

An even more basic flaw in the “experimentation” argument for according deference to state commission decisions is revealed in the terminology by which the argument is expressed: states should be allowed to make decisions interpreting or implementing the Act as “appropriate,” or provided they comply with “basic federal standards,” or fall within a “reasonable range.”<sup>75</sup> All of these formulations reflect an inability to draw any practical line between “policy” decisions that should be made by the FCC, and those that should be made by the states. As a result, regulators and the industry become mired in endless battles regarding which side of the line a particular issue falls, and the FCC is subjected to increased pressure to affirmatively or through inaction set the line on the side of no federal standards at all.

The final argument in favor of according judicial deference to state commission decisions is that the FCC cannot anticipate or lacks the resources to address every issue arising under the Act.<sup>76</sup> That the FCC cannot anticipate every issue is true but irrelevant to the question of whether it should address those issues that it *can* anticipate (or are brought to its attention). Moreover, there has been no empirical analysis

---

74. Weiser, *Federal Common Law*, *supra* note 5, at 1736-38. Raymond Gifford, the Chairman of the Colorado Public Utilities Commission (“CPUC”) until earlier this year, described the strategy of some CLECs as “intimidating the regulators into giving them the (Bell’s) network at prices that will induce entry,” rather than “competing by differentiating [their] products or being more efficient than [their] rivals.” Kris Hudson, *AT&T to Offer Local Service in 2 Major Quest Markets*, DENV. POST, Sept. 19, 2003, at C2.

75. Weiser, *Telecomms. Reform*, *supra* note 1, at 31, 32, 12.

76. See Weiser, *Federal Common Law*, *supra* note 5, at 1699.

of the relative resources available to state commissions and the FCC to decide non-factual issues arising under the Act.<sup>77</sup> In all events, the issue is not whether state commissions should decide issues necessary to arbitrate disputes over the terms to be included in, or enforce, interconnection agreements. The Act expressly authorizes state commissions to resolve disputes that arise in negotiations, and it has been uniformly construed to permit state commissions to enforce agreements. This explicit and unquestioned delegation to states to resolve factual disputes and apply the law to particular facts in arbitration and enforcement proceedings minimizes the drain on FCC resources, which can instead be applied to legal and policy issues.

### III. THE SUPPOSED "INEVITABILITY" OF AND ALTERNATIVES TO DEFERENCE

Proponents of a rule requiring that federal courts accord "Chevron-like" deference to state commission decisions under the Act have observed that even absent a formal rule, courts have adopted a variety of approaches that are the equivalent of deference, without using the term.<sup>78</sup> That courts defer *sub silentio* to state commission decisions, however, is not a reason to adopt a rule promoting or legitimizing that behavior. To the contrary, the courts should modify their practices to conform to the statutory design and pre-Act precedent. A ready alternative, referral to the FCC, is available for those cases where courts are unable to discern the resolution of a legal or policy issue that best complies with the Act and FCC precedent, or furthers the Act's objectives.

As the Supreme Court explained in *Iowa Utilities Board*, the Act assigns to federal courts an important role in ensuring that state

---

77. Unlike the FCC, state commissions usually are responsible for the regulation of other industries, such as electric power and natural gas, in addition to communications. Further, the staff and other resources of state commissions vary widely. Former CPUC Chairman Gifford has noted that state commissions are "vastly different" from the FCC and therefore "simply don't have the staff and resources to perform the analysis at the same level and caliber" as the FCC. "Panelists Question States' Ability to Handle 'Triennial Review' Mandates," *Telecommunications Reports Daily* (Sept. 24, 2003).

78. Weiser, *Telecomms. Reform*, *supra* note 1, at 50-53. A more recent and especially obvious example is *Level 3 Communications, LLC v. Public Util. Comm'n of Oregon*, CV 01-1818-PA, slip op. (Or.Ct. App. Nov. 25, 2002), in which the court deferred to a decision of the Oregon state commission after concluding that the language of the Act and the FCC's regulation provided no "clear answer" on the legal issue before it. The court's opinion includes no analysis whatever of the Act's objectives or FCC decisions addressing related issues. Federal court decisions such as these provide state commissions with strong incentives to oppose the promulgation by the FCC of additional regulations that would have the effect of constraining the discretion they would otherwise enjoy.

commissions adhere to federal law and policy.<sup>79</sup> Even assuming Congress considered state commissions to be more capable than federal courts of selecting the resolution of a particular issue that best comports with the Act and its objectives – a proposition unsupported by the Act itself – Congress may have believed this consideration to be outweighed by the costs imposed on the industry and the economy by inconsistent state commission decisions on the same issues, or by concerns that state commissions would be more inclined in deciding doubtful issues to favor legacy state regulation and policy at the expense of the Act’s objectives. If so, then deference does serious damage to the Act’s design.

More fundamentally, the proponents of judicial deference err by presupposing that the choice of entities to interpret vague and ambiguous statutory provisions is limited to the courts or state commissions. That choice arises, however, only in the absence of applicable FCC rules or decisions. The arguments in favor of deference appear to assume that deference will not affect the number of issues that must be resolved by either state commissions or the courts. Yet, deferring to state commission decisions, whether by rule or practice, is likely to result in even fewer FCC rules and decisions interpreting and applying the Act, a corresponding increase in the necessity of state commissions or federal courts to perform these functions, and diminished prospects for the evolution of federal telecommunications policy expected by Congress.

Under *Chevron*, deference is not appropriate if the agency’s decision is inconsistent with the language of the statute at issue. When making or reviewing decisions under the Act, state commissions and federal courts are required to consider in addition to the statutory language any unambiguous FCC regulations or decisions concerning the issue before it.<sup>80</sup> In other words, deference would be appropriate only in the absence of FCC precedent that clearly and unequivocally requires a different result. Thus, the expectation of state commissions that their decisions will be accorded deference by federal courts in the absence of controlling FCC precedent could increase their opposition to the exercise by the FCC of its authority to issue new rules or decisions. This expectation likely explains the “passionate” character of the debate over “states’ rights” questioned by the Supreme Court in *AT&T v. Iowa Utilities Board*.<sup>81</sup> In addition, a rule legitimizing such deference would also make it easier

---

79. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378-79 n.6 (“[I]f the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.”).

80. 47 U.S.C. §252(c)(1) (2003) (expressly requires that state commission decisions comply with regulations adopted by the FCC under §251).

81. 525 U.S. at 378 n.6.

for the FCC to excuse its own inaction, if not increase its reluctance to take action over the objections of its state counterparts.

For these reasons, federal courts should not defer to state commission decisions on legal or policy issues, but should instead carefully scrutinize those decisions and endeavor to resolve the issue in a manner that best comports with the language and objectives of the Act, as informed by any relevant FCC decisions – including its decisions on different but related issues. Although not entitled to deference, the decision of the state commission may guide the court if its reasoning is sufficiently compelling and supported. In this regard, an understanding by state commissions that their decisions will *not* be accorded deference may not only lessen their incentives to oppose FCC action, but may also cause them to more carefully consider the Act's underlying policies and relevant FCC precedent, and to provide more thorough explanations of their decisions for the benefit of the reviewing court and the parties.

Of course, certain cases may present issues for which no superior resolution is apparent from the Act, FCC precedent, or *de novo* review of the state commission's decision and reasoning. In these cases, the court should refer the issue to the FCC under the doctrine of primary jurisdiction, and request the FCC to respond to the referral within a specified period of time.<sup>82</sup> Referrals in these cases will assist the FCC in identifying the issues for which its further guidance is truly necessary, and reinforce its role as the primary administrator of *federal* telecommunications laws and policies. Although the FCC expressly invited such referrals in its 1996 *Local Competition Order*,<sup>83</sup> federal courts have rarely referred to that agency issues arising under the Act<sup>84</sup> In addition, Congressional committees responsible for oversight of the FCC should track the number of referrals, and the timeliness of the FCC's responses. Such measures will assist Congress in ensuring that the FCC carries out the role assigned it under the Act.

Finally, the concerns expressed by CLECs and ILECs alike that state commissions may skew the results of the fact-finding process to reach their own preferred policy outcomes warrant rigorous judicial review of important factual determinations such as whether a given UNE

---

82. See *Reiter v. Cooper*, 507 U.S. 258, 268-69 (1993) (For a discussion of the primary jurisdiction doctrine); *Allnet Communication Servs., Inc. v. Nat'l Exch. Carrier Ass'n*, 965 F.2d 1118 (D.C. Cir. 1992).

83. *Local Competition Order*, 11 F.C.C.R. 15,499, 15,563-64 (1996).

84. See *AT&T v. Southwestern Bell Tel. Co.*, No. A-97-CA-029-SS, slip op. at 6 (W.D. Tex. Aug. 17, 1998) (referring to the FCC an issue arising under the Act); *Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements*, *Memorandum. Opinion & Order*, 15 F.C.C.R. 13,896, 13,897 n.5 (2000) (resolving referred issue).

satisfies the “impairment” test,<sup>85</sup> or the level of costs incurred to provide a UNE.<sup>86</sup> Consistent with pre-Act precedent, federal courts have applied the relatively deferential “substantial evidence” or “arbitrary and capricious standards of review to factual determinations by state commissions under the Act.<sup>87</sup> Although not supposed to be “toothless,” these standards of review have rarely resulted in reversals or remands of factual determinations by state commissions. Where evidence is fairly balanced, it is entirely appropriate to affirm the commission’s finding of fact. Reversal or a least a remand, however, should result when the weight of the evidence is contrary to the commission’s finding. Some weighing of evidence by district courts is necessary to ensure that the Act is applied uniformly and in a manner that is consistent with federal law and policy.

#### IV. CONCLUSION

The Telecommunications Act of 1996 “unquestionably” took from the states the regulation of local telecommunications competition.<sup>88</sup> In place of state regulation, the Act created the outlines of a national policy framework, to be completed largely by the FCC but then applied by state commissions to disputes between ILECs and new entrants. In practice, however, state commissions have assumed the role mandated by Congress for the FCC, resulting in substantial inefficiency and uncertainty, and threatening attainment of the Act’s objectives.

Rather than cement or even accelerate this shift by deferring to legal and policy determinations of state commissions, federal courts should conduct the rigorous *de novo* review required by decades of precedent concerning federal review of state agency orders. In lieu of deference, the courts should refer to the FCC under the doctrine of primary jurisdiction those issues that cannot readily be resolved by application of the Act’s text, its underlying purposes, FCC precedent or persuasive analysis of the foregoing by state commissions. Although *de novo* review of factual determinations by state commissions is not appropriate, the courts should ensure that those determinations are supported by the record and not a device for implementing the state’s policy preferences.

For its part, the FCC should reaffirm and adhere to the commitment it made in 1996 to lead the evolution of federal

---

85. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

86. See *id.*

87. See *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157 (D. Or. 1999) (applying the substantial evidence test); *U.S. West Communications, Inc. v. Jennings*, 304 F.3d 950 (9th Cir. 2002) (Applying the arbitrary and capricious standard of review).

88. *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 377-78.

telecommunications policy by issuing additional and revised local competition rules that would bind state commissions in arbitration and enforcement proceedings, and federal courts in reviewing state commission decisions. The FCC should also reissue its invitation to the courts to refer matters to it, and promptly resolve all such referrals. State commissions should be encouraged to actively participate in the FCC's proceedings. The FCC should seriously consider comments by state commissions addressed to the merits of particular issues, in light of the substantial experience they have accumulated in arbitration and enforcement proceedings, and their proximity to consumers. The FCC, however, and not the states, ultimately must resolve legal and policy issues arising under the Act.

