Frequency Efficient Use of
Paging Service
State Law

Petitions for reconsideration of amendment of Parts 2 and 73 pertaining to preemption of state statutes regulating entry of radio common carrier paging services on FM subcarriers granted to an extent. Commission preempts state regulation that prohibits or impedes entry based on desire for spectrum efficient services fulfilling a public need. Petitions to repeal Section 22.516, traffic load studies, granted to an extent. Petition to consider variable-tuned FM subcarrier receivers denied.
—*Subsidiary Communications Authorization*
BC Docket No. 82-536

FCC 84-187

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

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| In the Matter of | |
| Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorization | BC Docket No. 82-536 |

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1984; Released: May 2, 1984

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING IN PART AND ISSUING A STATEMENT.

## *Introduction*

1. On April 7, 1983, the Commission adopted a *First Report and Order* in BC Docket No. 82-536 amending Parts 2 and 73 of the Commission's Rules concerning use of subsidiary communications authorization.[1] Petitions for reconsideration were filed by the National Radio Broadcasters Association (NRBA), National Association of Broadcasters (NAB), the law firm Fletcher, Heald and Hildreth (Fletcher) on behalf of

[1] 48 FR 28,445, June 22 (1983).

their FM licensee clients, Telocator Network of America Inc. (Telocator) and Reach, Inc. Several parties filed Oppositions to Petitions for Reconsideration.[2] Replies to the Oppositions to Petitions for Reconsideration were filed by Fletcher, NAB and Reach.

2. In general, the Petitions for Reconsideration focus on the issue of preemption of state regulation with respect to paging services operating on FM subcarriers. Based on our review of the issues raised by these parties and our desire for spectrum efficient services fulfilling a public need, we are preempting state regulation that has the effect of prohibiting or impeding entry of radio common carrier services operating on FM subcarriers. The action we take today is a measured one designed only to insure the accomplishment of legitimate federal interests and is in no way intended to impinge upon regulation by state authorities to the extent such regulation does not have the effect of prohibiting or impeding entry.

*Background*

3. The Commission's *First Report and Order* removed long standing restrictions that limited the use of FM subcarriers and caused this resource to remain underutilized. Specifically, the major policy change established in the *First Report and Order* permits FM subcarriers to be used for non-broadcast as well as broadcast services. Broadcast-related services available on FM subcarriers may include enhancing main channel programming with stereo or quadraphonic sound; station cuing control and meter reading; and narrowcasting services such as background music, radio reading services, foreign language programming and various types of informational and instructional programming. Non-broadcast services may be similar to services presently being provided by licensees in the private radio services and/or the common carrier services. Included in such non-broadcast services are paging services. In the *First Report and Order* the Commission determined that FM subcarriers used for non-broadcast related Communications will be treated in the same general manner, as the providers of similar services in private radio and common carrier. However, the overall intent of the *First Report and Order* was to remove restrictions on FM subcarrier use and to foster efficient use of underutilized spectrum in serving the needs of the public.

4. The remaining policy changes contained in the *First Report and Order* include eliminating time restrictions on subcarrier operation; expanding the usable channel baseband to permit instantaneous sidebands up to 99 kHz; and eliminating the restriction that subcarriers be

[2] Commenting parties include: Telocator, Reach, Bell Operating Companies, American Foundation for the Blind, Westinghouse Broadcasting and Cable, Inc., Minnesota State Services for the Blind and Visually Handicaped, North Carolina Association of Broadcasters, NAB, and the Association of Reading Services, Inc.

frequency modulated. Regarding procedural matters, the *First Report and Order* eliminated the program log requirement for subcarrier operations and eliminated the requirement for a formal subcarrier application (Form 318). In the *Second Report and Order* adopted in this proceeding the Commission increased the modulation levels to 110% when subcarriers are transmitted.[3]

5. In summary, the *First Report and Order* represents a major effort on the part of the Commission to ensure efficient FM spectrum utilization and to remove unnecessary burdens imposed on FM licensees due to overly restrictive rules.

*Summary of Petitions*

6. *Preemption.* The petitions for reconsideration and subsequent oppositions and replies focus primarily on the issue of preempting state regulations regarding entry into common carrier paging services.

7. Fletcher, NAB, and NRBA, in their petitions, argue that the intent of the *First Report and Order* will be frustrated by anticompetitive state entry restrictions and that the Commission has the authority to preempt state entry regulation.

8. Reach, in its petition argues that limited preemption is clearly within the Commission's authority and that such action is necessary if any significant use is to be made of FM subcarriers. In its analysis, Fletcher reports that only 21 states including the District of Columbia have open entry requirements for paging services while the remaining states impose three general types of entry burdens on prospective paging carriers. Specifically, fifteen states enforce what Fletcher calls exclusionary statutes—requiring the prospective entrant to show need for its proposed service and prove that the proposed service will cause no economic harm to the existing carrier and that the existing carrier cannot satisfy the demand. The second class of paging entry statutes is defined by Fletcher as restrictive. In this category six states require the prospective entrant to demonstrate an unmet need for the proposed service. In this situation an existing paging service operator can intervene in the certification process of a proposed new applicant by protesting the application and showing that the unmet need can be served by the existing carrier; or that the addition of another paging service will injure that service of the existing operator. The final category of states have certification statutes that require the applicant to demonstrate some level of unmet need for the proposed new service, however these states do not protect established carriers *per se.* Fletcher's review of state statutes demonstrate that in a majority of the states, regulations pertaining to entry into a paging service via FM subcarriers will be both time consuming and expensive.

[3] 49 F.R. 15,079, April 17, 1984.

Because of these state statutes, competition between FM subcarrier paging service and traditional radio common carrier paging services may never occur. The result of such entry regulations would be both inefficient use of the spectrum and the interest and need of the public going unserved.

9. Telocator Network of America argues that petitions filed by Reach, Fletcher, NAB and NRBA requesting preemption of state regulatory statutes represents an effort to expand their competitive advantage over radio common carriers providing paging services. Telocator contends that the Commission does not have the power to preempt state regulations governing entry and that no basis has been established in this proceeding for the exercise of such power. Telocator characterizes paging services as predominantly intrastate and local exchange in nature. Therefore, it asserts that petitioners request for preemption is inconsistent with the Commission's authority. Specifically, Telocator interprets Section 331(c)(3) as prohibiting the Commission from using its radio licensing powers to preempt state regulation of paging service entry, rates or practices.

10. The Bell Operating Companies (BOC) argue that "to exempt one group of competitors from this regulation [preemption] would be to give those entities a competitive advantage over their regulated counterparts because the unregulated entities would be better situated to respond to market conditions than the regulated entities." Giving advantage to certain entities because they are FM broadcasters, according to BOC, would be totally unwarranted.

11. *Traffic Load Studies.* A second issue raised by the petitioners was a request to repeal or waive Section 22.516 of the rules for FM subcarriers. Section 22.516 of the rules requires that traffic load studies be conducted in conjunction with an application requesting the assignment of an additional frequency for an existing one-way signaling station or in conjunction with an application requesting the assignment of one or more additional frequencies for an existing two-way station. The NAB argues that the Commission should not apply Section 22.516 of the rules to FM subcarriers. NAB states that the lack of use of a subcarrier leased by a radio common carrier should not affect the radio common carrier's showing for an additional regular paging channel. The intent of this rule, according to NAB, is to prevent frequency warehousing and promote channel availability. NAB contends that "existing common carriers who attempt to foreclose new competition by 'warehousing' their own channels do so at no cost to themselves, because they already control underutilized channels." Warehousing FM subcarriers would require a leasing arrangement with broadcasters. The cost of leasing subcarriers combined with increased availability of channels decreases the likelihood of foreclosing competition by warehousing.

12. Reach also agrees that the premise behind Section 22.516 is no longer valid as it applies to FM subcarrier paging services. Requiring existing radio common carriers to demonstrate a fill requirement in order to lease subcarriers will restrict competition in the provision of FM subcarrier paging. Reach also argues that leasing costs serve as an inhibitor to anyone who might wish to warehouse all possible paging channels. Reach, however, does qualify its request to repeal Section 22.516. They argue that "... restricted radio common carrier entry into subcarrier paging imposed by Section 22.516 balances the restricted entry by others that exists because of various state restrictions on competitive radio common carrier services." Repealing Section 22.516 without preempting state entry practices would leave many FM licensees unable to enter the paging market themselves, and also unable to lease their subcarriers for paging purposes to anyone other than the existing local radio common carrier.

13. Telocator, like NAB and Reach, requests that the Commission repeal Section 22.516 for radio common carriers who choose to lease one or more FM subcarriers in the same market where they operate radio common carrier paging services. The discipline of marketplace forces dictate that warehousing of FM subcarriers by radio common carriers would be unlikely. Therefore, according to Telocator, there is no justification for wasting either the applicant's time or resources preparing Section 22.516 exhibits.

14. In summary, all parties agree that Section 22.516 should be repealed for radio common carrier seeking to operate paging services on FM subcarriers within the same market as the existing radio common carrier's paging service. The commenters believe that the economies involved in leasing FM subcarriers would work against radio common carriers' warehousing spectrum.

15. *Remaining Issues.* The remaining issues raised by petitioners include a request that the Commission: a) modify the radio common carrier application form for those wishing to operate paging services on FM subcarriers; and b) reexamine the issue of variable tuned FM subcarrier receivers.

*Discussion*

16. *Preemption.* In our *First Report and Order* in this proceeding we adopted what we believed was a flexible set of rules to govern the telecommunications services offered by means of FM radio station subcarriers. The rules were thought to be appropriate in light of the apparently competitive nature of the services that would be provided and the need to provide flexibility for entrepreneurial and technical innovation in untried areas of service. Additionally, the rules were designed to promote the rapid introduction of service to the public, to encourage the

use of what had been a largely fallow communications resource, and to permit the transmission of a variety of services including private or common carrier communications in conjunction with a broadcasting facility. We also indicated that private systems operating on FM subcarriers were exempt from state and local regulation in accordance with Section 331(c)(3) of the Act.[4,5] On reconsideration, however, several entities have requested that we also preempt state regulation of FM subcarrier services offered on a common carrier basis because state regulation has proven to be a barrier to the development and provision of new or additional common carrier services over FM subcarriers.[6]

[4] Section 331(c)(3) provides that ". . . no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service . . .". 47 U.S.C. § 331(c)(3).

[5] Once a service is classified as private under the statutory test contained in Section 331(c) of the Act, it is exempt from state and local regulation. This enables the Commission to expedite the availability of private carrier services through FM subcarriers without unnecessary restrictions. FM broadcast licensees seeking to provide private carrier paging service must notify the Licensing Division of the Private Radio Bureau in Gettysburg, Pennsylvania, 17325, by letter certifying that their facilities will only be used for permissible purposes under 47 C.F.R. Parts 90 and 94, and that the service will only be offered to users eligible under 47 C.F.R. Part 90 of the rules. They must also certify that any interconnection of the station with a telephone exchange or interexchange service or facility will be obtained in accordance with Section 331 of the Act. The letter of notification is all that is required to be sent to the Commission. There are no application forms, and no separate licenses will be issued. In addition, the letters of notification do not give rise to a comment period or petitions to deny. As a result of these simplified procedures, the Private Radio Bureau already has received 50 letters from FM broadcast licensees, notifying the Licensing Division that they are initiating private carrier service on subcarrier facilities.

[6] This proceeding and the discussion herein concern the regulatory treatment of FM radio station subchannel communications services. Comparable kinds of communications, with some technical variations, may also be distributed using the ancillary communications capacity on the vertical blanking interval of television stations or on television broadcast station subchannels. In authorizing expanded uses of these communications channels, we have followed the same pattern adopted with respect to FM subchannels. Petitions asking for reconsideration of our teletext decision (*Report and Order in BC Docket 81-741*, FCC 83-120, __ FCC 2d __ (Released May 20, 1983)) raised issues substantially identical to those raised here. In addition, in our decision authorizing nonbroadcast uses of television subchannels (*Second Report and Order in Docket 21323*, FCC 84-116, __ FCC 2d __ (Released April 23, 1984)), we specifically indicated that the resolution of the preemption issue with respect to FM subchannels would cover TV subchannels as well. All the comments concerning this issue that have been submitted in those proceedings have been considered. Accordingly, we regard the decision herein to be dispositive of the state regulatory preemption issues for television ancillary services as well as for those offered over FM subchannels. Copies of this *Memorandum Opinion and Order* will be filed in Dockets 81-741 and 21323. We have proposed to follow the same pattern in the AM broadcasting areas as well. (*Notice of Proposed Rulemaking in MM Docket 83-1322*, FCC 83-571, FCC 2d __ (Released December 14, 1983). *See also Notice of Proposed Rulemaking in MM Docket 84-168*, FCC 84-50, __ FCC 2d __ (Released March 8, 1984).

17. Those favoring preemption contend that preemption will benefit the public by increasing competition, enabling businesses to be flexible in their service offerings, and encouraging more efficient use of the radio spectrum. In particular, they emphasize the overriding federal responsibility for management of the radio spectrum and the broad powers necessarily accorded the Commission in carrying out that responsibility. On the other hand, several commenters have questioned our legal authority to preempt state regulation. They have argued that it is inequitable to treat communications service offerings over FM broadcast subcarriers differently than similar conventional radio common carrier services. After reviewing the various arguments presented, we are persuaded that state regulation that has the effect of prohibiting of impeding entry of common carrier FM subcarrier services frustrate legitimate federal objectives and should be preempted for the reasons described below.

18. Although we believe preemption of this state regulation to the limited extent indicated herein is warranted in this instance, we reach that conclusion fully cognizant of the fact that we have historically permitted the states to regulate the various facets of common carrier mobile services, such as paging.[7] We also recognize that because we are engaging in this limited preemption of common carrier radio services offered on FM subcarriers, but not conventional common carrier radio services, there will be some disparity in treatment of similar services. However, because the record in this proceeding only addresses the problems that have arisen with state entry regulation of common carrier services offered on FM subcarriers, and in particular paging, this proceeding does not provide the appropriate vehicle for changing existing policies relating to state entry regulation of conventional radio common carrier services. In light of that potential disparity in treatment, however, we expect to issue a notice of proposed rulemaking addressing the need to preempt state regulation that has the effect of prohibiting or impeding the entry of conventional common carrier mobile services in the foreseeable future.

[7] *See e.g., Mobile Tariff Filings,* 1 FCC 2d 830 (1965), reprinted, 53 FCC 2d 579 (1975); *Morrison Radio Relay Corp.*, 31 FCC 2d 612, 616 (1971); *First Report and Order*, CC Docket No. 20870, 69 FCC 2d 398, 402-404 (1978), *recon. denied,* 80 FCC 2d 294, 296-297 (1980); *Curtin Call Communications, Inc.*, 62 FCC 2d 211 (1976); *Canaveral Communications,* 24 FCC 2d 279, *recon. denied,* 26 FCC 2d 73 (1970). Indeed, Section 22.13(f) of the Commission's rules requires all common carrier mobile service licensees to demonstrate compliance with state certification requirements. To the extent we are today preempting state entry regulation, that provision will not apply to any licensees providing common carrier mobile services over Teletext and TV and FM subcarriers.

19. With respect to preemption, the Supreme Court recently indicated that Congress may preempt state law in either of two general ways.[8] First, even in the absence of explicit preemptive language,[9] Congress may implicitly indicate its intent to completely occupy a given field, and any state law encompassed within that field would automatically be preempted. Such intent could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it.[10] Second, in those instances where Congress has not entirely displaced state regulation, state law can be preempted to the extent it actually conflicts with federal law. Such conflicts may occur when "compliance with both Federal and State regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes. *Fidelity Federal Savings and Loan Association v. de la Cuesta, supra.* Our decision to preempt state entry regulation is based upon the conflict between state entry regulation in this instance and this Commission's federal objectives.

20. Initially, we conclude that whenever a common carrier intends to provide interstate paging services utilizing a network of subcarriers, this Commission may preempt state entry regulation to the extent such regulation impedes the development of that service.[11] Moreover, because interstate systems also provide intrastate services between two or more cities in the same states, those intrastate services are technically and practically difficult to separate from the interstate services, we may also preempt state entry regulation of the intrastate paging services. *See California* v. *FCC*, 567 F. 2d 84, 86 (D.C. Cir. 1977), *cert. denied* 434 U.S.

[8] *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 103 S. Ct. 1713 (1983); *Silkwood v. Kerr-McGee Corporation*, 104 S. Ct. 615 (1984).

[9] As previously noted, Section 331(c)(3) explicitly provides for preemption of state and local government regulation of private carriers.

[10] *See Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1983); *Rice v. Santa Fe Elevator Crop.*, 331 U.S. 218, 230 (1947); *See also Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, supra* at 1722.

[11] *See Orth-O-Vision*, 69 FCC 2d 657 (1978), *aff'd sub nom: New York State Commission on Cable Television v. FCC & USA*, 669 F. 2d 58 (2d Cir. 1982); *Telerent Leasing Corp.*, 45 FCC 2d 204 (1974), *aff'd sub nom. North Carolina Utilities Commission v. FCC*, 537 F. 2d 787 (4th Cir.), *cert denied*, 429 U.S. 1027 (1976); *First Report and Order*, Docket 80-183, 89 FCC 2d 1337 (1982), *reconsideration denied in part*, 93 FCC 2d 908 (1983), aff'd mem. sub nom. *National Ass'n of Reg. Util. Commissioners v. FCC*, No. 83-1485 (D.C. Cir. 1984).

1010 (1978). In this regard, several commenters have indicated an interest in constructing nationwide or regional paging or data distribution systems that would encompass several states. Such systems would be comprised of numerous, interconnected local systems operating on either a common carrier or private radio basis.[12] Reach, Inc., in particular, has already signed up numerous FM stations themselves or leasees of FM subcarriers in cities across the country in an effort to develop a nationwide paging system.[13] Such systems are designed to make it possible to lease or purchase a subcarrier receiver and then receive a page or other communication virtually anywhere in the nation.[14] However, for such services to be economically viable, the system should, at the minimum, encompass all states in a region. State regulations precluding or impeding operations in any significant portion of the country or region are likely to make operation of such services a practical impossibility. For example, a regional system servicing Delaware, Pennsylvania, New Jersey, and Connecticut would would not be viable if service to New York — a major business center with substantial tourist trade — were not included as a result of the licensee's inability to obtain state common carrier certification from New York. Any such preclusion or impediment would be a direct burden upon interstate communications and hence conflicts with our licensing functions and authority to regulate such interstate systems under the Communications Act.[15]

21. Because this state regulation over local services conflicts with our authority under Section 301 of the Communications Act, we are also preempting state regulation of local services where such regulation has

[12] With respect to nationwide private carrier systems, the Private Radio Bureau, on October 21, 1982, granted 39 applications filed by Millicom Corporate Digital Communications, Inc., for 39 individual land station licenses to enable Millicom to operate as a nationwide Private Carrier Paging System ("PCPS") on the frequency 929.9875 MHz in 39 locations throughout the United States. In addition, the Commission allocated four of the private channels in the 929-930 MHz band for multi-location paging operations. Licensees authorized to provide a multi-area paging service were also permitted to provide local service in any part of the multi-area system. *Memorandum Opinion and Order*, Docket No. 80-183, FCC 83-513, released November 23, 1983.

[13] A February 15, 1984, Reach prospectus lists agreements of agreements in process to use the subcarriers of 118 stations for private or common carrier communications.

[14] Because many radio stations already have satellite reception equipment installed, it may well be possible for these communications to be distributed piggybacked on existing radio broadcast network services.

[15] We realize, however, that because of the intrastate or local characteristics, the states may have some interest in whether such services are authorized. Accordingly, the states, like any other interested party, may raise their concerns with this Commission whenever an entity applies to us for permission to commence common carrier subchannel operation. See also, footnote 29 *infra*. Moreover, we note that the states may impose regulations that do not prohibit or impede entry, for example, notification requirements *See* footnote 31, *infra*.

the effect of prohibiting or impeding entry. Section 301 requires the Commission "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels . . . by persons for limited periods of time, under licenses granted by Federal authority . . . ." Thus, Section 301 confers broad powers upon this agency to regulate the licensing or franchising of facilities.[16] The record before us amply demonstrates that, in this instance, state regulation that has the effect of prohibiting or impeding entry conflicts with our authority to license channels and determine their use. First, whenever a state denies certification to one of our licensees, there may result a clear conflict with our public interest determination that licensing of the service will serve the public interest. Here, several commenters argue that they have already experienced difficulties in obtaining state authorization for these services.[17] In addition, the commenters have provided us with a detailed list of all state laws regulating entry.[18] Those lists demonstrate that in numerous states our common carrier licensees must meet virtually insurmountable burdens before the states will permit them to offer service. For example, those state laws generally require a showing that there is an unmet need for the service and that existing licensees cannot or will not satisfy that need. Thus, even where applicants can demonstrate that an unmet need exists, existing licensees are almost always willing to satisfy that need and certification is denied. As a result, our licensees are usually unable to obtain certification in those states. Consequently, even though we have concluded that the public interest warrants the licensing of these common carrier radio facilities, state certification requirements, as a practical matter, entirely foreclose their construction and operation. Because these state certification requirements operate to prevent fulfillment of our licensing activities under Section 301, we conclude that preemption of those requirements is warranted.

22. Additionally, the mandate of Section 301 that we provide for the use of channels authorizes the Commission to allocate the Nation's scarce spectrum resources.[19] In attempting to satisfy that mandate, the public's need for new or additional services must be balanced against the limited

[16] *See National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 173 U.S. App. D.C. 413, 429 (1976).

[17] *See, e.g.*, Petition for Reconsideration and Consolidated Reply of Reach, Inc.

[18] *See* February 3, 1984 Memorandum filed in the record on behalf of Reach, Inc.

[19] *See e.g., Notice of Inquiry*, Gen. Docket 82-334, F.C.C., 82-286, mimeo No. 31575, released July 9, 1982; *Notice of Proposed Rule Making* Gen. Docket 82-334, F.C.C. 83-2, mimeo 32629, released January 13, 1983 in (48 Fed. Reg. 67302); *First Report and Order*, Gen. Docket 82-334, 54 RR 2d 1001 (48 Fed. Reg. 50, 722) (1983). This proceeding among other things addresses some of the problems we have experienced because of scarcity of spectrum and proposes several solutions.

spectrum currently available. In sum, we must strive for economy in the use of spectrum. Our decision to authorize nonbroadcast uses of FM subcarriers was premised upon the spectrum efficiencies that may be gained from a concurrent use of frequencies for both broadcast and nonbroadcast purposes. Such efficiencies promote national spectrum allocation policies by ensuring that spectrum does not remain unused. Furthermore, such policies also enable us to conserve valuable spectrum resources that otherwise would have to be allocated to each service individually. For example, although the Commission has allocated spectrum specifically for paging purposes, a very significant growth in demand for this service is projected,[20] and some, including Telocator, sought additional frequencies including channels for nationwide service.[21] Thus, it is evident that common carrier paging services are much in demand and provide an important use for the previously unused FM spectrum. State regulation that has the effect of prohibiting or impeding entry frustrates our objective of enabling beneficial use of this spectrum. Accordingly, we believe that limited preemption of state regulation of services authorized on FM subcarriers is necessary in order to ensure that the additional spectrum we have made available will not continue to remain unused.

23. Moreover, this Commission has, in conjunction with its spectrum licensing and allocation functions, developed rules and policies that strongly favor and encourage competition. For instance, in *Cellular Communications Systems, supra,* we provided that there be two entities offering service in each market, and we specifically foreclosed the states from altering that market structure. Additionally, to prevent mobile licensees from requesting additional facilities for the purpose of excluding potential competition, we have, in the past, found it to be necessary to require them first to demonstrate adequate loading on their existing channels.[22] The Commission has indicated that such pro-competitive policies further the public interest by facilitating the rapid introduction of new services, the lowering of rates, and increases in the quality of service. In contrast, state regulation which has the effect of prohibiting or impeding entry for common carriers generally preclude the introduction

[20] *First Report and Order, Gen. Docket 80-183, supra* at 1351.

[21] *Id.* at 1338. Although we declined to provide, beyond the forty channels proposed, any of the additional channels requested in Docket 80-183, we did so because of our belief that the additional space requested "could promote inefficient use of the 900 MHz band, which is also in demand by other services." This contrasts sharply with the use of FM subchannels where historic restraints that assured that frequencies would not be used at all or used inefficiently were removed specifically to allow a more efficient use.

[22] *See e.g., Further Notice of Proposed Rulemaking,* Docket 20870, 48 Fed. Reg. 9048 (1983); *Second Report and Order,* Docket 20870, 89 FCC 2d 1199 (1982); *Third Report and Order,* Docket 20870, 48 Fed. Reg. 8074 (1983).

of competition. They favor the existing licensee and, as noted above, provide the existing licensee with the first opportunity to satisfy any unmet need.[23] Such barriers to new entry are in fundamental conflict with our pro-competitive spectrum allocation policies. Therefore, we believe this state regulation of common carriers providing service over subcarriers must also be preempted for this reason.

24. In this connection, we also note that Congress has recently re-emphasized the importance of eliminating regulatory obstacles that hinder the development of new and additional uses of the spectrum. The Federal Communications Commission Authorization Act of 1983, Public Law 98-214, adds a new Section 7 to Title I of the Communications Act which states, in pertinent part,

> It shall be the policy of the United States to encourage the provision of new technologies and services to the public. Any person or party (other than the Commission) who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest.

This section requires the FCC to encourage the development of new services and provides a presumption that new services are in the public interest. A similar provision was previously included in Senate Bill S. 66, Senate Report No. 98-67. In explaining the objectives of that previous provision, the Senate Report emphasized that "the development of new technologies and the efforts of competitors seeking to respond to consumer demands will bring more service to the public than will administrative regulations." In further elaboration, the Senate Report states that "a claim that the new or additional service will provide competition that will take revenue from another service, either existing or proposed, will not be a valid rebuttal." The regulatory process, the Report states, "should not act as a barrier to those who wish to provide new and additional services."

25. Thus, to the extent that the issues raised herein turn on the implementation of Congressional policy underlying Section 301 of the Communications Act, we believe the Commission's authority must be exercised to eliminate barriers to entry and promote competition. New Section 7 of Title I thus provides strong support for the action we are taking today.

26. Having found authority for preemption in Title III, the only other consideration is whether some other provision of the Act prevents preemption. We recognize and the commenters have noted that Sections

[23] Indeed, we have recognized this problem before but, at that time, did not believe the circumstances warranted preemption. *See First Report and Order, Docket No. 20870,* 69 FCC 2d 398, 401 (1978). We have never, however, focused closely upon the effect of state certification upon spectrum utilization.

2(b) and 221(b) of the Communications Act expressly reserve certain regulatory functions to the states. Section 2(b) provides, in pertinent part, that,

> except as provided in Section 224 and subject to the provisions of Section 301, nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

Section 221(b) provides, in pertinent part, that

> subject to the provisions of Section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . .

These two provisions thus reserve to the states jurisdiction over charges, classifications, practices, services, facilities, or regulations concerning intrastate communication services and telephone exchange service, and historically, most aspects of common carrier paging services have been regulated by the states.[24] We have previously deferred consideration of whether we could preempt entry regulation of these common carrier services.[25] We conclude today that those provisions do not preclude our preemption of state regulation which has the effect of prohibiting or impeding entry of local and intrastate common carrier paging services.[26]

27. Sections 2(b) and 221(b) provide that state regulatory authority must give way to the extent that it conflicts with our authority under Section 301 of the Act.[27] Thus, the states may not engage in activities that

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[24] *See* footnote 6, *supra*. Other than preemption of entry regulation, we intend no change in the existing division of regulatory authority between the Commission and the States.

[25] *See, First Report and Order*, Docket No. 20870, 69 FCC 2d 398, 403 (1978), *recon. denied*, 80 FCC 2d 294, 296 (1980); *Cellular Communications Systems*, 86 FCC 2d 469, 505 (1981), *recon. granted in part*, 89 FCC 2d 59 (1982); *further recon. granted in part*, 90 FCC 2d 571 (1982). *See also Radiocall Corporation*, 92 FCC 2d 160, 163-164 (1982), *aff'd mem. sub nom. Marine Telephone Operator Association v. FCC*, No. 83-1056 (D.C. Cir. 1983).

[26] *See Memorandum Opinion and Order*, Docket 18262, *supra* at 975; *Cellular Communications Systems*, 86 FCC 2d 469, 503-504 (1981); *recon. granted in part*, 89 FCC 2d 59, 96 (1982); *further recon. granted in part*, 90 FCC 2d 571 (1982); *United Telephone Company of Ohio*, 26 FCC 2d 417, 419-420 (1970); *Midwest Corp.*, 53 FCC 2d 294, 303 (1975).

[27] The proviso "subject to Section 301" was added to Section 221(b) in 1954 at the suggestion of this Commission. According to the Commission's comments on the bill amending Sections 2(b) and 221(b), the purpose of the provision was to provide that ". . . this Commission retain jurisdiction over noncommon carrier regulatory aspects of the radio stations involved . . ." The Commission's comments also indicated that Sections 2(b) and 221(b) otherwise provided that the Commission's common carrier jurisdiction did not extend to certain intrastate or local telephone exchange services. *See* H.R. No. 910, 83d Cong., 1st Sess. at 4-5 (1953). Our action today is consistent with this interpretation of those statutory provisions. We are not using our Title II jurisdiction over common

interfere with our authority to license facilities and allocate spectrum under Section 301, so as to frustrate the federal purposes embodied in the Communications Act. *See e.g., National Association of Regulatory Utility Commissioners v. FCC, supra.*[28] As discussed above, we believe state that has the effect of prohibiting or impeding entry of these services conflicts with our spectrum allocation policies, as well as with our licensing authority developed in accordance with Section 301. Accordingly, we believe we may preempt this state regulation to the extent indicated even assuming such regulation is encompassed under Sections 2(b) and 221(b).[29]

28. Additionally, we note that, contrary to Telocator's contentions, Section 331(c)(3) of the Act was not intended to preclude our preemption

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carriers to preempt state entry regulation; rather, the basis for preempting state regulation that has the effect of prohibiting or impeding entry is the conflict between state common carrier regulation and our noncommon carrier licensing policies developed pursuant to Section 301. Because some entities are subject to both our Title II and Title III authority, policies developed pursuant to our radio licensing, or Section 301, authority can affect common carriers. Indeed, that is precisely the situation before us today. In such circumstances, the statute expressly provides, and the legislative history discussed above indicates, that Section 301 affords us jurisdiction.

[28] In dicta, the Court recognized that our Section 301 licensing power was an exception to the restraints of Sections 2(b) and 221(b). It further noted that Section 301 encompassed the power "to draw up comprehensive schemes providing the conditions under which licenses will be granted." In that case, the "comprehensive scheme" was the Commission's pro-competitive policy of creating an atmosphere of free entry and competition which was intended to maximize the development of mobile radio technology. That policy, as well as several others designed to implement Section 301, are the basis of our similar preemptive action today.

[29] The Commission has generally considered the type of service here in question (*i.e., paging service interconnected with the public switched telephone network) to be "telephone exchange service" within the meaning of Section 221(b). See* Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs, 1 FCC 2d 830 (1965); FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 FCC 2d 579 (1975); and MTS and WATS Market Structure, Phase I, FCC 84-36, 49 Fed. Reg. 7810 (March 2, 1984), at para. 149. *See also United States v. American Telephone and Telegraph Co.*, slip Op. 82-0192 (D.D.C. November 1, 1983), at pp. 4-6. Nevertheless, the evolution of the regulatory treatment of paging is somewhat obscure. At the federal level, paging appears to have been viewed historically as an adjunct or complement to two-way mobile telephone service and therefore deserving of identical regulation. At the state level, on the other hand, paging, because it is a one-way communications service, has not uniformly been treated as a "telephone" service by the state jurisdictions. *See, e.g., Illinois Consolidated Telephone Company v. Illinois Commerce Commission*, 447 N.E. 2d 295 (ILL. 1983), and *Radio Relay Corp. v. Public Utilities Commission*, 341 N.E. 2d 826 (Ohio 1976). *See also* the annual state-by-state survey of RCC regulation in *Telocator*, Vol. 11, No. 3 (March 1984), at pp. 86-88. (Some states regulate paging service provided by telephone companies differently from that provided by RCCs.) Given this regulatory environment, and given the technical and operational differences between traditional common carrier paging and FM subchannel paging, a case can be made that subcarrier paging does not fall within the bounds of Section 221(b).

of state entry regulation. Section 331(c)(3) provides that "no State or local government shall have any authority to impose any rate or entry regulation upon any private land mobile service, *except that nothing in this subsection may be construed to impair such jurisdiction with respect to common carrier stations in the mobile service.*" (Emphasis added). Section 331(c)(3) was enacted to preempt state regulation of private carrier systems. In taking that action, Congress also made clear that Section 331(c)(3) was not a basis for preempting state jurisdiction over common carrier services. The Conference Report accompanying new Section 331 explained that the states were to retain their jurisdiction over common carrier services to the extent that state regulation was "consistent with Sections 2(b) and 221(b)." H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982). Thus, Section 331(c)(3) did not change the balance of regulatory authority but simply deferred to Sections (2)b and 221(b). As we have noted, the states' authority to regulate intrastate services under Sections 2(b) and 221(b) is expressly subject to the provisions of Section 301. Our preemption action, which is based on Section 301, is thus fully consistent with the congressional intent expressed in the Conference Report. Our preemption of state regulation of common carriers that has the effect of prohibiting or impeding entry is not based upon subsection 331(c)(3), but upon the conflict between state entry regulations and our authority under Section 301 of the Act.[30] Accordingly, because it is evident that Section 331(c)(3) was not intended to address our authority under Section 301, we conclude that Telocator's contentions are without merit.[31]

29. *Traffic Load Studies.* Section 22.516 requires traffic load studies to be conducted in conjunction with applications for additional frequencies for an existing radio common carrier paging station. Petitioners requested

[30] We note that the Conference Report also contains a statement by the Committee that ". . . the Commission may not use its licensing powers to circumvent limitations on its economic regulatory jurisdiction over common carrier stations." Report at 56. This statement serves to reinforce our conclusion that the references to Sections 2(b) and 221(b) in Section 331 were not intended to alter the status of state and federal jurisdiction over radio common carriers under existing law. The references were intended merely to clarify that those provisions were unaffected by passage of Section 331. As discussed above, we believe the preemptive action we have taken herein is fully consistent with our authority under those provisions.

[31] There are, of course, matters relevant to the legitimate interests of the states that may become apparent during the entry stage. To the extent that regulation of these matters does not in any way have the effect of prohibiting or impeding entry, this action does not preempt them. For example, it may be necessary that states be notified of the fact that an entity is about to begin operation in order that the state can then exercise its legitimate post entry authority. Additionally, matters such as zoning, health and safety are appropriately regulated so long as the exercise of this authority does not have the effect of prohibiting or impeding entry.

that Section 22.516 be repealed for those existing radio common carriers seeking to lease FM subcarriers for paging services. The parties argue that the economics of leasing agreements and overall marketplace forces would thwart the practice of warehousing spectrum. We find that the costs associated with leasing and warehousing subcarriers would be expected to increase the costs of paging service operations, and would render such warehousing economically unjustifiable, in view of the numerous alternative means of providing paging service. Recent action by the Commission has made available the TV aural baseband for subcarrier operations.[32] Therefore, we conclude that the need for Section 22.516 no longer exists for those radio common carriers seeking to lease FM subcarriers within the market of their existing paging service. In addition, the warehousing of subcarrier channels, however economically unlikely, would not withhold from public use frequencies that have been allocated for the primary purpose of common carrier paging service. Based on the arguments raised by the petitioners and our desire to eliminate unneeded regulation, we are amending Section 22.516 to permit radio common carriers to lease FM subcarriers within the market of their existing service without having to conduct and submit traffic load studies.[33]

30. *Remaining Issues.* On the remaining issues, the Common Carrier Bureau has issued a *Public Notice* indicating that Form 401, Application for Common Carrier paging services, has been modified to take into account the unique aspects of such services offered on FM subcarriers.[34] Thus, the petitions for a revised application form for subcarrier paging are moot. Finally, the Commission stated in the *First Report and Order* that the issue of variable-tuned subcarrier receivers was beyond the scope of this proceeding. Further, the Commission issued a declaratory ruling on the applicability of Section 605 of the Communications Act of 1934, as amended, 47 U.S.C. §605, to the manufacture, sale or lease of tunable FM subcarrier receivers. The ruling stated that "the unauthorized interception and beneficial use of SCA transmissions which are intended for subscribers only would constitute a violation of this statutory provi-

[32] *Second Report and Order*, the use of subcarrier frequencies in the aural baseband of television transmitter, Docket No. 21323, FCC 84-116, released April 23, 1984.

[33] For a more general review of Section 22.516 see *Fourth Report and Order* in Docket No. 20870 FCC 84-179, adopted April 26, 1984, Regulatory Policies and Procedures for the Domestic Public Land Mobile Radio Service. This *Order* was preceded by a *Notice of Inquiry and Notice of Proposed Rulemaking*, 61 FCC 2d 266 (1976); *First Report and Order*, 69 FCC 2d 398 (1978) (elimination of prior state certification requirement); *Second Report and Order*, 89 FCC 2d 1199 (1982) (elimination of need showing for one initial two-way channel); *Third Report and Order*, FCC 83-53, 48 Fed. Reg. 8074 (1963) (objective need standards adopted for additional two-way channels).

[34] "FCC will accept FM Subchannel Applications for Common Carrier Services," *Public Notice* No. 1754, January 10, 1984.

sion."[35] None of the *Petitions* point to manifest errors, or omissions within the *First Report and Order* with regard to variable-tuned subcarrier receivers. Additionally, no new evidence was submitted that would have changed the result of the decision. Therefore, the *Petitions for Reconsideration* of these issues are denied.

31. Accordingly, IT IS ORDERED, that the Petitions for Reconsideration filed by the National Association of Broadcasters, National Radio Broadcasters Association the law firm of Fletcher, Heald and Hildreth and Reach, Inc., pertaining to preemption of state statutes regulating entry into paging service on FM subcarriers ARE GRANTED to the extent indicated above. Petitions filed by the National Association of Broadcasters, National Radio Broadcasters Association, the law firm of Fletcher Heald and Hildreth, Reach, Inc., and Telocator Network of America to repeal Section 22.516, traffic load studies, ARE GRANTED to the extent indicated above. The petition by Reach, Inc., to consider variable-tuned FM subcarrier receivers in this proceeding IS DENIED. Finally, petitions to streamline the radio common carrier application form for those seeking to operate paging services on FM subchannels ARE MOOT due to modifications to the form made by the Common Carrier Bureau.

32. Authority for adoption of the rules contained herein is contained in Sections 2, 4 (i), and 303 of the Communication's Act of 1934, as amended.

33. Accordingly, IT IS ORDERED, that Part 22 of the Commission's Rules IS AMENDED as set forth in Appendix A, effective June 8, 1984.

34. Further, IT IS ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

WILLIAM J. TRICARICO, *Secretary*

*Appendix*

Part 22 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

In Section 22.516 paragraph (a) is amended to read as follows:

§22.156 Usage showing for additional channels.

(a) * * *

(1) applications which request an additional frequency for an existing one-way signaling station (except where the additional frequency is made available as a subcarrier on a broadcast station licensed under part 73);

* * * * *

[35] Letter from Mr. James M. Weitzman (released February 17, 1984).

STATEMENT
OF
COMMISSIONER HENRY M. RIVERA
DISSENTING IN PART

RE: Petition for Reconsideration of Amendment of Parts 2 and 73 of the Commission's Rules Concerning Use of Subsidiary Communications Authorizations (BC Docket No. 82-536).

I dissent to that part of the majority's decision which preempts state entry regulation of local radio common carrier paging services operating on FM subcarriers.[1] I do not endorse "protectionist" regulatory action either at the state or federal level. However, I dissent because I do not believe the Communications Act permits this Commission to preempt local radio common carrier paging services and because even if the Communications Act permitted such preemption, the record here is inadequate to support the majority's action.[2]

Congress defined the scope of state and federal authority over the telecommunications industry in Sections 2(b)[3] and 221(b)[4] of the Communications Act. These two provisions expressly reserve to the states all regulatory functions for intrastate communications services[5] that have to

[1] To the extent that this proceeding similarly resolves the preemption issue with respect to TV subchannels and AM broadcasting I likewise dissent. *Memorandum Opinion and Order*, BC Docket No. 82-536, FCC 84-187, released May 2, 1984 (Reconsideration Order), at footnote 6.

[2] In contrast, our legal authority and the record support preemptive action with regard to interstate paging systems, *e.g.*, nationwide or regional services encompassing several states. See Reconsideration Order at para. 20. Such a result is consistent with our recent decision to preempt state regulation of the three 900 MHz nationwide paging systems offered by conventional common carrier mobile services. *See Nationwide Paging Service*, Third Report and Order, Gen. Docket No. 80-183, FCC 84-148, adopted April 11, 1984, released 5/24/84, 97 FCC 2d 900.

[3] 47 U.S.C. Section 152(b) provides, in pertinent part, ". . .subject to the provisions of Section 301, nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier. . .".

[4] 47 U.S.C. Section 221(b) provides, in pertinent part, ". . .subject to the provisions of Section 301, nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service . . . in any case where such matters are subject to regulation by a State commission or by local governmental authority."

[5] It cannot be rationally argued that the type of paging service under discussion here properly is not an intrastate communications service. *See Mobile Tariff Filings*, 53 FCC 2d 579 (1975); *Illinois Bell Telephone Co.*, CC Docket Nos. 78-314 and 315, FCC 83-489, released October 21, 1983.

do with charges, classifications, practices, services, facilities, or regulations.[6] These statutory reservations are subject only to the legitimate exercise of this Commission's Section 301 licensing powers.

Thus, the Communications Act frames the issue before the Commission as: to what extent does the exercise of Section 301 licensing powers override state regulatory authority as delineated in Sections 2(b) and 221(b)? The answer is clear. Section 301 was never intended to establish federal economic regulatory jurisdiction that negates the jurisdiction over local common carrier activities Congress expressly reserved to the states. A contrary interpretation would render the reservations to the states meaningless.[7] Under the majority's expansive interpretation of its Section 301 powers, federal jurisdiction is unlimited, given that virtually every form of intrastate service uses some form of radio service licensed by the FCC.[8] This result is manifestly contrary to congressional intent.

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Despite the self-serving reservations to the contrary in the Reconsideration Order at footnote 29, presently and in the past, the Commission has consistently treated common carrier paging services as "telephone exchange service" within the meaning of Section 221(b). *See e.g.*, Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs, 1 FCC 2d 830 (1965); FCC Policy Regarding Filing of Tariffs for Mobile Service, 53 FCC 2d 579 (1975); and MTS and WATS Market Structure, Phase I, FCC 84-36, 49 Fed. Reg. 7810 (March 2, 1984), at para. 149. The majority admits this fact in footnote 29: "At the federal level, paging appears to have been viewed historically as an adjunct or complement to two-way mobile telephone service and therefore deserving of identical regulation."

Furthermore, such services are provided by divested BOCs under the Modification of Final Judgment [*United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 103 S. Ct. 1240 (1983)] and are specifically defined as "exchange telecommunications services" for that purpose. *United States* v. *American Telephone and Telegraph Co.*, Civ. No. 82-0192 (D.D.C. November 1, 1983), slip op. at 4-6. The statutory language and legislative history confirm the appropriateness of the above determinations, *See e.g.*, 47 U.S.C. Sections 3(n) and 331(c)(3); H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982).

[6] While "entry" regulation is not expressly enumerated, state "facilities" regulation encompasses the public convenience and necessity standard determination of "entry" regulation. Likewise, at the federal level, unspecified "entry" regulation is exercised through "facilities" authorizations. *See* 47 U.S.C. Section 214. *See also* 47 U.S.C. Sections 331 (c)(3); H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982).

[7] The majority's reliance upon our general Title III and Section 7 regulatory authority (presumed to be encompassed by Section 301 licensing powers) as a basis for preemption is misplaced in light of the explicit constraints upon the exercise of that authority imposed by Section 2(b) and 221(b).

[8] I take no comfort from the majority's assertion that its action is limited to state actions that impede entry. See footnotes 15, 24 and 31 of the majority's opinion. This action is anything but a measured response. Its breadth is indicated in footnote 31 where the majority states that even local zoning, health and safety ordinances which have the effect of prohibiting or impeding entry are preempted.

Commenting (on behalf of this Commission) on a version of the 1954 amendments to Section 221(b) which added the "subject to Section 301" proviso, Chairman Rosel Hyde stated:

> The apparent intent of the proposed amendment to Section 221(b) is to assure that, where radio service is provided as part of telephone exchange service, including mobile as well as point-to-point service, it should be construed as exchange service under the section and hence not subject to the Commission's jurisdiction with respect to charges, classifications, practices, services, facilities, and regulations of common carriers, unless such service is not subject to regulation by State or local authorities.

Regarding the effect of the "subject to Section 301" proviso upon the relative jurisdictions of the FCC and states, Chairman Hyde noted:

> Such a provision which is presently included in Section 2(b)(2) of the act, is desirable in order to avoid any implication that the radio stations to which the section would have reference, would not be subject to the general radio regulatory provisions of title III of the act. The possibility that such radio operations, left unregulated, would cause destructive interference with other interstate radio operations makes essential that this Commission retain jurisdiction over the *noncommon carrier regulatory aspects of the radio stations* involved, and it is believed that the proposed legislation is not intended to restrict such jurisdiction.

H.R. Rep. No. 910, 83d Cong., 1st Sess. at 45 (1953) (emphasis added).

The House and Senate Reports are consistent with Chairman Hyde's understanding of the proviso's effect on the relative jurisdictions of the states and this Commission. For example, the Senate Report (repeating in substance the House Report) states that the purpose of the proviso is to clarify the Commission's common carrier jurisdiction where radio facilities are used by such carriers in lieu of wirelines:

> Questions have been raised, however, with regard to the possibility that such companies might become subject to Federal regulation on account of the use by such companies of radio as a medium instead of wire lines. Under certain circumstances the use of radio is the best engineering solution as, for example, in the case of telephone service to moving vehicles. . .
>
> The legislation is designed to make certain that the *use of radio will not subject to Federal regulation* companies engaged primarily in intrastate operations.

The Senate Report goes on to state:

> The adoption of this amendment is merely a perfecting amendment and would obviate any possible technical argument that the Commission may attempt to assert *common carrier* jurisdiction over point-to-point communication by radio between two points within a single state. . . The commission has not attempted to assert itself under such circumstances in the past. This amendment would crystallize the present regulatory practice. . .

S. Rep No. 1090, 83d Cong., 2d Sess. at 1-2 (1954) (emphasis added).

Furthermore, the recent legislative history of Section 331(c)(3) clearly reaffirms[9] that Sections 2(b) and 221(b) preclude federal preemption of state entry regulation for strictly local services:

> . . . [T]he Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier stations.

H.R. Rep. No. 765, 97th Cong., 2d Sess. at 56 (August 19, 1982).[10]

Most damning to the majority's view (and totally ignored in the majority's opinion) is the fact that this Commission has previously ruled that it has no jurisdiction over "entry" regulation of an intrastate mobile radio service pursuant to Section 221(b). Shortly after the enactment of the 1954 amendments to Section 221(b), the Commission stated:

> . . . [I]t is evident that this Commission has no jurisdiction with respect to the charges, classifications, practices, services, facilities, or regulations for, or in connection with, the mobile radio service in issue here, and this Commission's jurisdiction is limited to the jurisdiction flowing from Section 301 and title III of the Communications Act. Thus, while this Commission, in passing upon a grant of radio license in these circumstances, must consider the question of "public interest," it is evident that such "public interest" consideration is *predicated upon the question of whether the local regulatory body has certificated, or franchised, or in any other manner authorized, or permitted, the applicant to engage in the requested communications service.* Where it appears (as it does here) that the local telephone company has been so authorized or empowered, and that showing having been made to us, we are bound to determine that the "public interest" will be served by a grant to a properly qualified applicant. Thus, the *remaining examination of the application is limited to a determination only of the basic qualifications of the applicant and the technical sufficiency of the operation which he proposes.* That is what we have done in this case.
>
> Thus, insofar as the controversy in this case relates to the matter of *competitive impact of one telephone company's operation* upon the other, it is a matter for local regulation and determination. If the State commission were to determine that the complained of competition is undesirable, and were to withdraw its franchise or authorization to either company, *we would be bound to respect that determination and to govern our actions with respect to the radio authorization accordingly.* The only part of the controversy, here presented by Northern, in which we have primary jurisdiction is the question of the legal qualification of Souris to serve the public.

*Souris River Telephone Mutual Aid Corp.*, 28 FCC 275, 280 (1960) (emphasis added).

Even if our statutory authority to preempt were not suspect, the record upon which this preemption is founded is, to put it charitably, meager. It

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[9] The majority concedes that this language was "not intended to alter the status of state and federal jurisdiction over radio common carriers under existing law". Reconsideration Order at footnote 30.

[10] Notwithstanding this most recent declaration of congressional intent, the majority cites, at footnote 28, a less than definitive earlier pronouncement by the court in *dicta* in *National Association of Regulatory Utility Commissioners* v. *F.C.C.*, 525 F.2d 630, 173 U.S. App. D.C. 413, 429 (1976) in support of its position.

could scarcely be otherwise when one considers that this issue first arose in petitions for reconsideration — hardly a situation conducive to development of a full record. The record on this issue consists solely of anecdotal affidavits which purport to characterize the states' regulatory policies regarding common carrier paging service. Not a single state regulatory commission participated. In fact, during closing moments of the reconsideration process, the National Association of Regulatory Utility Commissioners (NARUC) raised the question of the adequacy of notice to the states regarding the preemption issue.[11] NARUC requested, but was denied, an opportunity to file comments on this issue.[12]

The law is clear that federal regulation should not be presumed to preempt state regulation without clear evidence of either congressional design to preempt the field or that state regulatory activities would obstruct the accomplishment and execution of the full purposes and objectives of Congress. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141 (1963), *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1947). Here, congressional design was most certainly to reserve to the states the authority to regulate local paging service. Additionally, we have no record on which to base a claim that state action frustrates congressional intent. Preemption, under these circumstances cannot withstand judicial scrutiny.

[11] Letter of Paul Rogers, General Counsel, and Genevieve Morelli, Deputy Assistant General Counsel, NARUC, to FCC Chairman Mark S. Fowler, April 13, 1984. In its haste to preempt, the majority does not even acknowledge the letter's existence.

[12] The decision to preempt state entry regulation of local paging on FM subcarriers is not only without adequate record support (even if, *arguendo*, not beyond the FCC's preemptive authority), but also arbitrarily results in two disparate schemes of regulation, *i.e.*, one for paging services offered on FM subcarriers and another for paging services offered on conventional common carrier radio services — dividing regulatory power over a potentially competitive market in an illogical way. *Cf. National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 616 (D.C. Cir. 1976). The majority acknowledges as much, *see* Reconsideration Order at para. 18, but offers no reasoned justification, contrary to established principles of administrative law. *See e.g., Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971); *Garrett* v. *FCC*, 515 F.2d 1056 (D.C. Cir. 1975); *Telocator Network of America* v. *FCC*, 691 F.2d 525, 537 (D.C. Cir. 1982); *Office of Communications of the United Church of Christ* v. *FCC*, 707 F.2d 1413, 1425 (D.C. Cir. 1983).