

## IOWA UTILITIES BOARD V. FCC

*By Wang Su*

The telecommunications industry has been surrounded by the jurisdictional battle between the states and the Federal Communications Commission (FCC) for a long time. The discrepancy in the rules, statutes, and policies issued by these different authorities may result in billions of dollars of gain or loss for large companies conducting business in this industry. The enactment of the Telecommunications Act of 1996 (the 1996 Act)<sup>1</sup> reshaped the border and altered the jurisdictional line in many ways, thus making a long-time controversy again the subject of vibrant debate. *Iowa Utilities Board v. FCC*,<sup>2</sup> a major case decided after the 1996 Act, involves the jurisdictional dispute between the FCC and the states. Its decision will have a significant effect on the interpretation of the 1996 Act itself as well as on the FCC's preemption power in light of the 1996 Act. The extent to which its opinion will be accepted will determine the FCC's and the states' roles in regulating the telecommunications industry, and thus will influence the telecommunications industry significantly.

### I. THE EIGHTH CIRCUIT'S DECISION

Iowa Utilities Board and other petitioners, consisting largely of incumbent Local Exchange Carriers (LECs) and state utility commissions from across the country, appealed to the United States Court of Appeals for the Eighth Circuit for review of an order of the Federal Communications Commission. This order contained price rules that required the state commissions to calculate the cost that an incumbent LEC may charge its competitors when making its facilities available to them.<sup>3</sup> The petitioners maintained that the FCC had no jurisdiction over the prices that an incumbent LEC may charge its competitors for interconnection, unbundled access, resale, and transport and termination of calls.<sup>4</sup> They also asserted that the service was intrastate in nature,<sup>5</sup> so that the FCC was denied jurisdiction by section 2(b) of the Communications Act of 1934 (the 1934

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1. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C.A. § 151 (West Supp. 1996)).

2. 120 F.3d 753 (8th Cir. 1997).

3. See 47 C.F.R. §§ 51.503, 51.505 (1996).

4. See *Iowa Utilities Board*, 120 F.3d at 792-93.

5. See *id.* at 793.

Act).<sup>6</sup> The FCC argued that the 1934 Act grants it parallel jurisdiction to promulgate pricing rules regarding local telephone service, and that section 2(b) does not function as a jurisdictional bar to prevent the Commission from issuing the pricing rules at issue.<sup>7</sup>

In *Iowa Utilities Board*, after denying the FCC's motion to vacate the temporary stay of the operation and effect of the pricing provisions, the Eighth Circuit overturned several provisions of the FCC's First Report and Order.<sup>8</sup> In holding that the FCC "exceeded its jurisdiction in promulgating the pricing rules" regarding local telephone service,<sup>9</sup> the court examined both the plain language of the 1996 Act and the impossibility exception<sup>10</sup> to section 2(b) of the 1934 Act. After concluding that the plain language of the 1996 Act conferred no jurisdiction to the FCC over intrastate pricing regulation,<sup>11</sup> the Eighth Circuit then ruled that the FCC was not entitled to the impossibility exception,<sup>12</sup> and that section 2(b) of the 1934 Act continued to be a jurisdictional bar that is "hog tight, horse high, and bull strong."<sup>13</sup>

#### A. The Plain Language of the 1996 Act

The Eighth Circuit first maintained that the plain language of the 1996 Act did not confer the FCC jurisdiction over intrastate price regulation.<sup>14</sup> In its answer, the FCC did not argue that the states had no pricing authority over interconnection arrangements; instead, they argued that subsection 251(d)(1) of the 1996 Act established shared or parallel jurisdiction between the states and the FCC,<sup>15</sup> and the general rulemaking provisions, namely subsections 154(i), 201(b), and 303(c), also provided the FCC with the authority to promulgate pricing rules relating to intrastate interconnection arrangements.<sup>16</sup> The FCC was responsible for issuing general rules governing the rate-making procedure, while the states were required to follow the FCC in calculating their actual prices.<sup>17</sup> The court disagreed.

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6. 47 U.S.C.A. § 151 (West Supp. 1996).

7. See *Iowa Utilities Board*, 120 F.3d at 794.

8. See *id.* at 792, 819-20.

9. *Id.* at 794.

10. See *infra* note 33 and accompanying text.

11. See *Iowa Utilities Board*, 120 F.3d at 794-96.

12. See *id.* at 796-800.

13. *Id.* at 800.

14. See *id.* at 794-96.

15. See *id.* at 794.

16. See *id.*

17. See *id.*

Writing the opinion for a three-judge panel, Judge Hanson first pointed out that “subsection 251(d)(1) operates primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC’s involvement,”<sup>18</sup> and “nowhere in section 251 is the FCC authorized specifically to issue rules governing the rates for interconnection, unbundled access, and resale, and the transport and termination of telecommunications traffic.”<sup>19</sup> Judge Hanson then went on to argue that “while subsection 201(b) does grant the FCC jurisdiction over charges regarding communications services, those services are expressly limited to interstate or foreign communications services by subsection 201(a).”<sup>20</sup> Meanwhile, subsections 154(i) or 303(r) “merely supplies the FCC with ancillary authority” to issue regulations that may be necessary to fulfill its legislative purposes contained elsewhere in the statute.<sup>21</sup> “Neither subsection confers additional substantive authority on the FCC.”<sup>22</sup> Moreover, Judge Hanson saw the absence of any reference to the FCC in the related sections of the 1996 Act as an expressed intent of Congress that the FCC should not participate in determining the prices that the incumbent LECs would be able to charge for opening their networks to new entrants.<sup>23</sup>

### **B. Section 2(b) and the Impossibility Exception**

The Eighth Circuit next ruled that the section 2(b) hurdle which excluded the FCC from intrastate telecommunications market was still in effect, and that the FCC was not entitled to the narrow exception of impossibility.<sup>24</sup>

Section 2(b) expressly excludes the FCC’s jurisdiction over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service.”<sup>25</sup> To overcome this hurdle, the FCC argued that section 2(b) was no longer enforceable in this context because Congress had expressly granted it jurisdiction over intrastate pricing regulation in the 1996 Act.<sup>26</sup> Moreover, the FCC argued that even if section 2(b) was applicable in this context, the FCC was still entitled to the impossibility exception because the subject matter at issue can-

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18. *Id.*

19. *Iowa Utilities Board*, 120 F.3d at 794.

20. *Id.* at 795.

21. *Id.*

22. *Id.*

23. *See id.*

24. *See id.* at 796-800.

25. 47 U.S.C. § 152(b) (1994).

26. *See Iowa Utilities Board*, 120 F.3d at 793-94.

not be separated into interstate and intrastate components, and the rules and statutes promulgated by the states, if not preempted, would have negative effects on the FCC's legitimate legislation purpose.<sup>27</sup>

In rejecting the FCC's argument, Judge Hanson first maintained that section 2(b) of the 1934 Act was still applicable.<sup>28</sup> Relying on the United States Supreme Court's statement in *Louisiana Public Service Commission v. FCC*<sup>29</sup> that the effect of section 2(b) could only be excluded by Congress' direct modification of that section or unambiguous grant of authority to the FCC,<sup>30</sup> Judge Hanson reasoned that because no language in the 1996 Act expressly conferred authority to regulate intrastate interconnection pricing to the FCC, the FCC was barred from such regulation by section 2(b).<sup>31</sup> Judge Hanson further reasoned that "a federal statute's mere application to intrastate telecommunication matters is insufficient to confer intrastate jurisdiction upon the FCC," and that "the statute must also directly grant to FCC such intrastate authority in order to overcome the operation of section 2(b)," because section 2(b) was a limit on the FCC's jurisdiction rather than a limit on Congress.<sup>32</sup>

Then, Judge Hanson went on to address the impossibility exception. In its *Louisiana Public Service* opinion, the Supreme Court offered a narrow exception to section 2(b). This exception allowed the FCC to regulate the intrastate telecommunications market when it was impossible to separate the subject matter into interstate and intrastate components and the coexistence of both the FCC's and the states' regulations on the same subject matter would impede the FCC from fulfilling its legislative duties imposed by Congress.<sup>33</sup> Judge Hanson recognized this narrow exception, but he argued that "telecommunication rate-making traditionally has been capable of being separated into its interstate and intrastate components."<sup>34</sup> Further, Judge Hanson determined that the FCC did not meet the burden of showing the negative effect on its legitimate interstate regulatory goals because the states are allowed to establish different methods to calculate intrastate interconnection rates.<sup>35</sup>

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27. *See id.* at 796-800.

28. *See id.* at 796-98.

29. 476 U.S. 355 (1986).

30. *See id.* at 377.

31. *See Iowa Utilities Board*, 120 F.3d at 796-98.

32. *Id.* at 798.

33. *See Louisiana Public Service*, 476 U.S. at 374-76.

34. *Iowa Utilities Board*, 120 F.3d at 798.

35. *See id.*

## II. DISCUSSION

The Eighth Circuit adopted a textual approach to interpret the language of the 1996 Act. It ignored the extensive effect of section 253 of the 1996 Act and the intent of Congress to bring competition into the intrastate telecommunications market. Also, the Eighth Circuit's interpretation of the impossibility exception to section 2(b) of the 1934 Act is too narrow. Because of the expressed intent of Congress to erode the monopolistic nature of local telecommunications service by introducing competition into this market,<sup>36</sup> and to establish a national standard in the regulation of the telecommunication service market,<sup>37</sup> the Eighth Circuit should define the FCC's preemption power in a broader way so that the FCC can effectively carry out its duty to implement these congressional intentions.

### A. The Plain Language of the 1996 Act

The Telecommunications Act of 1996 was designed to erode the monopolistic nature of the local telephone service industry by promoting nationwide free competition.<sup>38</sup> In several important respects, the 1996 Act changes the traditional division of labor between the FCC and the states and "alters the bright line between inter- and intrastate services."<sup>39</sup>

Section 251(d)(1) of the 1996 Act provides that "[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."<sup>40</sup> Section 252(c)(1) provides that:

[i]n resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a state commission shall ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title.<sup>41</sup>

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36. See generally 47 U.S.C.A. § 151 (West Supp. 1996); Statement by President William J. Clinton Upon Signing S. 652, 32 WEEKLY COMP. PRES. DOC. 218 (Feb. 12, 1996); *Iowa Utilities Board*, 120 F.3d at 791.

37. See 141 CONG. REC. S8174 (daily ed. June 12, 1995) (statement of Sen. Hollings) ("We are trying to get uniformity, understanding, open competition in interstate ... and intrastate ... telecommunications.").

38. See generally 47 U.S.C.A. § 151.

39. Phillip Rosario & Mark F. Kohler, *The Telecommunications Act of 1996: A State Perspective*, 29 CONN. L. REV. 331, 332-33 (1996).

40. 47 U.S.C.A. § 251.

41. *Id.* § 252.

The Eighth Circuit interpreted section 251(d)(1) as merely a time constraint requiring the FCC to complete all actions necessary within the specified period,<sup>42</sup> and section 252(c)(1) as nothing more than a grant of jurisdiction to the FCC over the actions expressly enumerated in section 251.<sup>43</sup> Although this interpretation is still within the possible readings of the plain text, it is almost the narrowest interpretation that can be derived from these two sections. It is truly questionable that Congress intended such a narrow reading when composing these two sections.<sup>44</sup>

Besides its narrow interpretation of subsections 251(d)(1) and 252(c)(1), the Eighth Circuit also ignored the extensive effect of section 253 of the 1996 Act. Subsection 253(a) provides that “[n]o state or local statute or regulation, or other state or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>45</sup> It would be difficult to imagine language broader than this. Although “prohibit” may be a high standard, by using the phrase “or have the effect of prohibiting,” Congress allows FCC preemption even when state regulations prevent interconnection in an indirect way.<sup>46</sup>

Subsection 253(b) provides that “[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis ... requirements necessary to ... ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”<sup>47</sup> This subsection seems to have limited subsection (a)’s broad effect to a certain degree, but Congress then subjects both of these subsections to the FCC’s preemption power in subsection (d), which provides that “[i]f ... the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt ... to the extent necessary to correct such violation or inconsistency.”<sup>48</sup>

By enacting section 253, Congress expressly provided leeway for the FCC to enter into intrastate telecommunication regulation.<sup>49</sup> However, due to the inherent conflict between subsection 253(a) and 253(b), it is

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42. See *Iowa Utilities Board v. FCC*, 120 F.3d. 753, 794 (8th Cir. 1997).

43. See *id.* at 794-95.

44. See Duane McLaughlin, *FCC Jurisdiction Over Local Telephone Under the 1996 Act: Fenced Off?*, 97 COLUM. L. REV. 2210, 2248-49 (1997).

45. 47 U.S.C.A. § 253(a) (West Supp. 1996).

46. *Id.*

47. *Id.* § 253(b).

48. *Id.* § 253(d).

49. See generally *id.* § 253.

still not very clear to what extent the FCC is permitted to regulate intrastate telecommunications services. In order to clarify the ambiguity, congressional intent should be examined to determine the proper balance between intrastate and interstate regulations.

Congress had two conflicting concerns when drafting section 253. One is the possibility of making the FCC's preemption power overbroad.<sup>50</sup> Another is the FCC's indispensable role in promoting nationwide free competition.<sup>51</sup> During the floor debate, both the House and the Senate were aware of the possible overbroad preemption power granted to the FCC by section 253.<sup>52</sup> One amendment to this section would have eliminated the authority of the FCC to preempt state or local regulations that were considered to be entry barriers.<sup>53</sup> However, Senator Pressler, author of the Senate's proposed legislation, indicated that only uniform federal rules would be able to provide the stability and certainty that are crucial to the development of a competitive nationwide telecommunications market, and "the authority granted to the FCC ... is critical if we are going to open those markets, because a lot of states and cities and local governments may well engage in certain practices that encourage a monopoly or that demand certain things from the business trying to do business."<sup>54</sup> As a result, the final draft is a compromise between these two concerns. Section 253 first grants the FCC broad preemption power in subsections (a) and (d), then cuts off the FCC's preemption power with regard to regulations related to public rights-of-way, and puts an emphasis on state regulations if the subject matter is closely related to consumer rights or the quality of telecommunications services.<sup>55</sup> This indicates that Congress knowingly allowed the FCC broad preemption power on issues directly related to the 1996 Act's primary goal of promoting competition, but reserved the major power to the states with respect to issues of consumer protection.<sup>56</sup> Congress' expressed intent to establish a predictable national standard also buttressed this interpretation.<sup>57</sup> The FCC, as a national

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50. See 141 CONG. REC. S8172, S8175 (1995).

51. See 141 CONG. REC. S8134-01, S8174 (1995).

52. See generally H.R. CONF. REP. No. 104-458 (1996); 141 CONG. REC. S8172, S8175 (1995).

53. See 141 CONG. REC. S8170 (1995).

54. See 141 CONG. REC. S8134-01 (1995).

55. See generally 47 U.S.C.A. § 253 (West Supp. 1996).

56. See Walt Saproonov et al., *Summary of the Telecommunications Act of 1996 and the Federal Communications Commission's Interconnection Rules*, 1014A PLI/CORP 17, 27 (1997).

57. See *supra* text accompanying note 54.

agency, is in a much better position than the states to create such a standard.

Interconnection price regulation is neither related to public rights-of-way, nor closely associated with consumer rights. Although it has an arguably close relationship with the quality of telecommunications services, these regulations are more likely to fall within the category of regulations which directly deal with introducing competition to the intrastate telecommunications market. As discussed above, Congress intended the FCC to have broad preemption power on these regulations. Otherwise, the FCC's congressionally imposed duties to promote nationwide free competition will be frustrated, especially at the local level.

One possible concern is that the FCC may exceed its jurisdictional limit by promulgating blanket preemption regulations. This concern is not necessary because of four main reasons. First, if Congress believes it has granted too broad of a preemption power to the FCC, Congress can limit it by itself. Second, the 1996 Act requires the FCC to review the efficacy of its regulations every two years to eliminate unnecessary regulations.<sup>58</sup> Third, capricious interpretation of FCC's preemption power is subject to the scrutiny of the federal courts.<sup>59</sup> Finally, if the FCC is declined jurisdiction, the states will have absolute power over intrastate price regulations. However, the states are much less reliable than the FCC to introduce competition into local telecommunications markets.<sup>60</sup>

## B. Section 2(b) and the Impossibility Exception

Section 2(b) of the 1934 Act provides that "nothing in this chapter 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 intrastate communication service by wire or radio of any carrier ...."<sup>61</sup> This section is traditionally considered to be a jurisdictional bar that prevents the FCC from entering intrastate telecom-

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58. See 47 U.S.C.A. §§ 160-61.

59. See 5 U.S.C. § 706 (1994).

60. See *supra* text accompanying note 54; McLaughlin, *supra* note 44, at 2234 ("Whatever their opinion of the FCC, the sponsors of the bill in the Senate seemed to have even less confidence in the states to usher in the changes necessary to bring competition, and they successfully defended the power of the FCC to preempt state regulations."); Henry H. Bartlett, *The Public Interest and the Introduction of Competition into Local Telephone Networks*, 5 COMLCON 251, 259 (1997) ("The FCC correctly asserts an incumbent LEC has little economic incentive to help newcomers to enter its market and take away part of its market share; it would more than likely charge unreasonable rates or refuse to connect a competitor at all.").

61. 47 U.S.C. § 152(b).



munication regulation. In its *Louisiana Public Service* opinion, the Supreme Court spelled out the impossibility exception to section 2(b), which allows the FCC to preempt intrastate telecommunication regulations when it is impossible to separate the intrastate and interstate components of the subject matter which is being regulated, and the state regulations will have a negative effect on interstate telecommunications market if not preempted.<sup>62</sup>

As to the impossibility exception, it is still not very clear what standard should be used to determine whether the subject matter could be separated into interstate and intrastate elements. In *Louisiana Public Service*, the Supreme Court cited with approval a Fourth Circuit opinion, which indicated that if, as a matter of economics and practicality of operation, it is not feasible to limit the use into either interstate or intrastate elements, it could be considered as inseverable.<sup>63</sup> This theory appears to have been accepted by the Ninth Circuit in *People of the State of California v. FCC*.<sup>64</sup> In that case, the court recognized that if the effect of a state regulation on a intrastate subject matter was such that a carrier's interstate operations would, as a practical matter, be affected in a manner inconsistent with federal policy, inseverability can be found on this base only.<sup>65</sup> This kind of impossibility test is referred to as "Inseverability of Effect."<sup>66</sup>

One critical question that is left unresolved is to what extent a state regulation must affect the carrier's interstate operations before the intrastate and interstate components of the use can be considered inseverable. The Eighth Circuit was right to say that "the fact that the local competition provisions of the Act may have a tangential impact on interstate services is not sufficient to overcome the operation of section 2(b)."<sup>67</sup> However, there must be a limit beyond which the states' impact would be impermissible. Absent clear direction from both the legislative history and the common law on what exactly the limit should be, considerations should be given to federal policy and this issue should be treated as an issue of fact that will be resolved on a case-by-case basis.

The tension between section 2(b) of the 1934 Act and section 253 of the 1996 Act is obvious. Given the reality that every local regulation that

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62. See *supra* text accompanying note 33.

63. See *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) (citing *North Carolina Util. Comm'n v. FCC*, 537 F.2d 787, 793 (4th Cir. 1976)).

64. 905 F.2d 1217 (9th Cir. 1990).

65. See *id.* at 1242-44.

66. Michael J. Zpevak, *FCC Preemption after Louisiana PSC*, 45 FED. COM. L.J. 185, 199 (1993).

67. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997).

may be considered a barrier to entry is somehow related to the "charges, classifications, practices, services, [or] facilities"<sup>68</sup> of intrastate communication, section 253 can hardly have any substantial meaning if section 2(b) is left untouched. On one hand, the Senate Committee Report stated that "[c]hanges in technology and consumer preferences have made the 1934 Act a historical anachronism."<sup>69</sup> On the other hand, Congress did nothing to directly invalidate section 2(b). To effectively enforce federal statutes, there must be a clear, predictable interpretation of these statutes. The intent of Congress is key when trying to find such an interpretation.

One primary purpose of the 1996 Act is to introduce competition into intrastate telecommunications market.<sup>70</sup> As discussed above, a better interpretation of congressional intent is that the FCC should be given broad preemption power over issues that directly affect competition, while the states should be the principal players with respect to regulations dealing with public rights-of-way, consumer protection, and the quality of telecommunications service. This interpretation will give section 2(b) of the 1934 Act not only a reasonable amount of deference, but also allow the FCC to carry out its congressionally delegated duty. Under these policy considerations, the Eighth Circuit should have interpreted the inseparability issue of the impossibility exception in a manner that allows the FCC to overcome section 2(b)'s effect. This may be the only way to achieve a consistent result under both section 253 of the 1996 Act and section 2(b) of the 1934 Act. Otherwise, the FCC's attempts to enforce competition under the requirements of the 1996 Act will be frustrated.<sup>71</sup>

### III. CONCLUSION

"[President] Clinton said the 1996 Act was 'truly revolutionary legislation that will bring the future to our doorstep.'"<sup>72</sup> Section 253 of the 1996 Act extends the FCC's jurisdiction into intrastate telecommunications regulation entitling the FCC to preempt any state regulations that "prohibit or have the effect of prohibiting the ability of any entity to pro-

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68. 47 U.S.C. § 152(b) (1994).

69. S. REP. NO. 104-23, at 2 (1995); *see also* Bartlett, *supra* note 60, at 253 ("The 1934 Act incorporated the premise that telephone service was best served by a single firm who could provide better and lower cost services than competing suppliers.") (citing 141 CONG. REC. S7881 (daily ed. June 7, 1995)).

70. *See generally* 47 U.S.C.A. § 151 (West Supp. 1996).

71. *See* McLaughin, *supra* note 44, at 2248.

72. Thomas G. Krattenmaker, *The Telecommunication Act of 1996*, 29 CONN. L. REV. 123, 123 (1996) (citations omitted).

vide any interstate or intrastate telecommunications service.”<sup>73</sup> The Eighth Circuit, without addressing the overall spirit of the 1996 Act, interpreted the FCC’s preemption power in a way that is unduly narrow. Because there is still no convincing guidance on what the new jurisdictional line between the FCC and the states should be after the 1996 Act, it is foreseeable that future litigation will continue to arise in similar contexts.

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73. 47 U.S.C.A. § 253(a) (West Supp. 1996).

