

AT&T CORP. V. IOWA UTILITIES BOARD

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The Telecommunications Act of 1996 ("1996 Act") is a monumental piece of legislation designed to restructure the telecommunications industry by encouraging competition and facilitating the development of new technologies.¹ The 1996 Act seeks to foster competition in local telephone service markets by imposing a set of duties on currently existing providers of local telephone service² (more commonly known as incumbent local exchange carriers or "ILECs"). *AT&T Corp. v. Iowa Utilities Board*³ is a dispute between the Federal Communications Commission ("FCC") and state public utility commissions ("PUCs") about who has authority under the 1996 Act to administer this new competitive scheme.

In *AT&T v. Iowa Utilities Board*, the Supreme Court held that the plain meaning of the 1996 Act vests power in the FCC that had traditionally belonged to the states.⁴ This Note argues that in arriving at this decision, the Court strains the plain language of the 1996 Act and seems to ignore much of its precedent regarding both state control of intrastate telecommunications and the operation of federal preemption in general. The Court relies on the findings of the FCC regarding its own jurisdiction. Although arguably improper, this reliance is an understandable and perhaps unavoidable application of the *Chevron* doctrine.⁵ Despite its dubious foundation in doctrine, this Note concludes that the decision is probably salutary because any other reading of the 1996 Act would engulf the telecommunications industry in protracted litigation, which would burden the

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1. See Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996) (codified in scattered sections of 47 U.S.C.) (stating that the purpose of the Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies").

2. The 1996 Act also deals with many other areas such as broadcast media, cable and wireless service. However, since *AT&T Corp. v. Iowa Utilities Board* is a dispute about the local competition provisions of the 1996 Act relating to telephone service, only those sections will be discussed in this Note.

3. 119 S. Ct. 721 (1999).

4. See *id.* at 730.

5. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (stating that courts should defer to reasonable decisions by administrative agencies when Congress's intent is ambiguous).

courts and retard the progress of local competition that Congress clearly mandated.

I. REGULATORY BACKGROUND

A. From Natural Monopoly to Facilitated Open Market

The 1996 Act reflects a reconceptualization of how local telephone service markets operate. Telephone service was traditionally viewed as a "natural monopoly."⁶ In order to compete, multiple local service providers would have had to create enormously expensive parallel networks of cables, switches and lines into customers' homes. Because of the inefficiency and impracticability of such duplication, a single provider was the natural outcome. Even after the development of microwave technologies, which paved the way for MCI's competitive entry into the long distance market in the 1960s,⁷ local service continued to be considered a natural monopoly.⁸

The local competition provisions of the 1996 Act are based on the idea that competition in local service is both possible and necessary in order to lower prices and encourage innovation. The 1996 Act attempts to overcome existing local access monopolies and facilitate market entry by creating a system of duties and incentives for ILECs. Section 251 sets out the conditions for mandatory interconnection: ILECs must negotiate in good faith with potential competitors who wish to interconnect their services with the existing network,⁹ as well as provide access to the current network, in whole or in part, through the resale of services¹⁰ or the leasing of

6. See generally THOMAS KRATTENMAKER, TELECOMMUNICATIONS LAW AND POLICY 464 (1994).

7. See HENK BRANDS AND EVAN T. LEO, THE LAW AND REGULATION OF TELECOMMUNICATIONS CARRIERS 262 (1999).

8. See generally *United States v. American Tel. and Tel. Co.* 552 F. Supp. 131 (D.D.C. 1982) (basic premise of Modification of Final Judgment ("MFJ") breaking up the Bell system was that long distance service, which had the potential to become competitive, must be separated from local service, which would continue to operate as a monopoly. This prevented the Bell system taking advantage of a local service monopolies to squeeze out long distance competitors, both by making it difficult for competitors to connect to local service and by charging their captive local rate payers high rates and using the profits to underwrite artificially low prices in long distance).

9. See 47 U.S.C. § 251(c)(1) (Supp. IV 1998).

10. See *id.* § 251(c)(4).

unbundled network elements.¹¹ Prices negotiated for these services should be “just, reasonable, and non-discriminatory.”¹²

If the parties fail to negotiate an agreement, section 252 provides that state public utility commissions arbitrate the dispute and that their determinations of the rates for interconnection and unbundled network elements “shall be based on . . . cost . . . and may include a reasonable profit.”¹³ As an incentive for the ILECs to facilitate access to their networks quickly, section 271 allows them to begin offering long distance service in their local calling area as soon as they can demonstrate the presence of a facilities-based competitor (i.e., one that has built its own parallel network) or can show they have met a fourteen point “competitive checklist” which includes compliance with the interconnection and access requirements of sections 251 and 252.¹⁴

B. Telecommunications Federalism

Because it was thought to be a natural monopoly, local telephone service has been regulated almost since its inception in order to prevent the exploitation of consumers.¹⁵ The basic jurisdictional framework of the Communications Act of 1934 (“1934 Act”) was the division of regulatory authority over communications between the newly created Federal Communications Commission (“FCC”) and the states. While section 152(a) of the 1934 Act granted the FCC power over “all interstate and foreign communication by wire or radio,”¹⁶ section 152(b) explicitly denied the FCC jurisdiction “with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . .”¹⁷ Authority over intrastate service continued to be vested in the state public utility commissions (“PUCs”), which had traditionally regulated the local provision of phone service.

11. *See id.* § 251(c)(3).

12. *Id.* § 251(c)(2)(D) (interconnection); *id.* § 251(c)(3) (unbundled access).

13. *Id.* § 252(d)(1)(A)-(B).

14. *See id.* § 271(c)(2)(B).

15. Regulation usually took the form of the grant of an exclusive franchise subject to ‘rate of return’ limits on the prices that could be charged. *See BRANDS & LEO, supra* note 7, at 4.

16. 47 U.S.C. § 152(a) (1994).

17. *Id.* § 152(b). Brands and Leo suggest that this clause was inserted partly to legislatively overrule the application to telecommunications of the Supreme Court’s holding in the *Shreveport Rate Cases* (which recognized federal authority over intrastate rates under the Commerce Clause where necessary to “foster and protect interstate commerce.” *Houston, East & W. Tex. Ry. Co. v. United States*, 234 U.S. 342, 353 (1914)). *See BRANDS & LEO, supra* note 7, at 46.

Given that the same physical plant of wires and switches carries both local and long distance calls, the division of the system between intrastate and interstate is often ambiguous. The FCC and state regulators have often squabbled about how to assign costs and share authority.¹⁸ Nevertheless, preemption questions were of secondary importance so long as the Bell System possessed a nearly complete monopoly on phone service and equipment.¹⁹ As competition began to emerge in some parts of the telecommunications industry, however, the interests of regulators diverged more often and courts began to examine more closely the boundaries of jurisdictional authority.²⁰

Appellate decisions in the 1970s and early 1980s construed the 1934 Act in ways favorable to FCC preemption. For example, in *North Carolina Utilities Commission v. FCC*,²¹ the Fourth Circuit held that while section 152(b) of the 1934 Act deprived the FCC of power over intrastate regulations that were "separable from and [did] not substantially affect the conduct or development of interstate communications,"²² it did not sanction any state regulation of intrastate matters that "in effect encroaches substantially upon [FCC] authority."²³ This line of reasoning, based on the separability of intrastate and interstate services and on the encroachment on federal objectives, was followed in a long line of appellate court cases.²⁴

In 1986, the Supreme Court's decision in *Louisiana Public Service Commission v. FCC*²⁵ ("*Louisiana PUC*") significantly limited the FCC's preemption power. Utility commissions in numerous states challenged an FCC order that changed the way utilities determined their depreciation rates (and, by extension, the invested capital base used to calculate their allowable profit). The FCC interpreted section 220 of the 1934 Act²⁶ as

18. See, e.g., *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148 (1930) (separation of interstate from intrastate telephone revenue was necessary to recognize the competent governmental authority in each sphere).

19. See BRANDS & LEO, *supra* note 7, at 56.

20. See *id.* at 56-57.

21. 537 F.2d 787 (4th Cir. 1976).

22. *Id.* at 793.

23. *Id.*

24. See, e.g., *California v. FCC*, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978); *Computer and Communication Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom.* *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 461 U.S. 938 (1983), *discussed in* Michael Zpevak, *FCC Preemption After Louisiana PSC*, 45 FED. COMM. L.J. 185, 187-89 (1993).

25. 476 U.S. 355 (1986).

26. See 47 U.S.C. § 220(b) (Supp. IV 1998) (providing that "[t]he Commission may prescribe . . . the classes of property for which depreciation charges may be properly in-

preempting inconsistent state depreciation regulations whenever federal policies would be frustrated by them.²⁷

The Court asserted that while it was true that Congress has the power to preempt state regulation that frustrates federal purposes, a federal agency may only do so “if it is acting within the scope of its congressionally delegated authority.”²⁸ The Court found that the dual jurisdictional scheme embodied in sections 151 and 152(b) of the Act was determinative, and that section 152(b) “fences off from FCC reach or regulation intrastate matter—indeed, including matters ‘in connection with’ intrastate service”²⁹ and that the scheme represented “a Congressional *denial* of power to the FCC.”³⁰ The Court specifically rejected arguments based on *NCUC I* that section 152(b) only applied to purely local matters which did not impinge on interstate communication in any way.³¹

II. CASE SUMMARY

The *Iowa Utilities Board* litigation evolved from the FCC’s interpretation of the 1996 Act in its First Report and Order, entitled *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*.³² In this rulemaking, the FCC claimed broad authority regarding all aspects of the local competition provisions, including the ability to determine the pricing methodology for interconnection and access to unbundled network elements.³³ Additionally, the FCC adopted a pricing methodology—Total Element Long Range Incremental Cost (“*TELRIC*”)—which sets rates for new market entrants based on forward-looking costs³⁴ as opposed to historical costs.³⁵ ILECs argued that because it costs less today to add a user than it did to create existing capacity, charging new entrants forward-looking costs instead of historical costs means the difference be-

cluded under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property.”).

27. See *Louisiana PSC*, 476 U.S. at 362.

28. *Id.* at 374.

29. *Id.* at 370 (quoting 47 U.S.C. § 152(b)).

30. See *id.* at 374.

31. See *id.* (“The short answer to this argument is that it misrepresents the statutory scheme and the basis and test for pre-emption.”).

32. 11 F.C.C.R. 15,499 (1996) [hereinafter *First Report and Order*].

33. See *id.* ¶¶ 54, 111.

34. The cost to add customers to the network today. See *id.* ¶¶ 679-85. Note that *TELRIC* does not give the “actual” costs of connection because they are unknown. Rather, it relies on an economic model to estimate the costs.

35. The actual, embedded costs of building the existing network. See *id.* ¶¶ 704-05.

tween the two is "stranded"; thus, the ILECs' full cost of building their networks can never be recovered.³⁶

Though the substance of TELRIC was the real problem for the ILECs, they challenged the pricing methodology on jurisdictional grounds. State PUCs, which traditionally had rate making authority in local telecommunications markets, joined with several ILECs to challenge the general authority of the FCC to set rates and the validity of the FCC's pricing rules mandating the use of TELRIC. They argued that section 252 of the 1996 Act plainly directed the state commissions to set prices for interconnection, unbundled access and resale.³⁷ They further argued that the FCC could not determine these rates because section 152(b) prevented them from regulating local intrastate communications service.³⁸ The FCC countered that the 1996 Act gave them authority to "issue general rules governing the ratemaking procedure, while the state commissions are left to establish the actual prices by applying the FCC's mandates."³⁹

A. Eighth Circuit Decision⁴⁰

The Eighth Circuit found that the plain meaning of section 252(c)(2), which states that "a State commission shall . . . establish any rates for interconnection,"⁴¹ and section 252(d)(1), which provides for "[d]eterminations by a State commission of the just and reasonable rate for . . . interconnection,"⁴² was to grant state commissions primary authority to set rates.⁴³ The Eighth Circuit rejected the FCC's argument that the language of section 251(d)(1), which provided that the FCC complete "all actions necessary . . . to implement the requirements" of the section within six months,⁴⁴ granted the FCC plenary power over all aspects of section 251.⁴⁵ Instead, the court saw the provision as a time limit for FCC to make

36. See *id.* ¶¶ 706-07.

37. See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 793 (8th Cir. 1997), *reversed and remanded sub nom.* *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

38. See *id.*

39. *Id.* at 794

40. "United States Courts of Appeals have been granted exclusive statutory jurisdiction to review the FCC's final orders pursuant to 28 U.S.C. § 2342(1) (1994) and 47 U.S.C. § 402(a)." *Id.* at 793.

41. 47 U.S.C. § 252(c)(2) (Supp. IV 1998).

42. *Id.* § 252(d)(1).

43. See *Iowa Utils. Bd.*, 120 F.3d at 794.

44. 47 U.S.C. § 252(d)(1) (Supp. IV 1998).

45. See *Iowa Utils. Bd.*, 120 F.3d at 794.

rules concerning those aspects that Congress had explicitly instructed it to oversee, which did not include pricing.⁴⁶

Alternatively, the court found that section 152(b) settled any question about the FCC's ambiguous authority in favor of the states.⁴⁷ The court relied on *Louisiana PSC*'s reading of section 152(b) as an "explicit congressional denial of power" which could only be overcome by an unambiguous grant of authority.⁴⁸ The 8th Circuit compared the FCC's "round-about construction" of section 251 with explicit grants of authority to the FCC in section 276 of the 1996 Act⁴⁹ and in the Cable Act⁵⁰ and with the specific mention of the FCC in the non-pricing provisions of section 251.⁵¹

B. The Supreme Court Opinions

1. Majority opinion

Justice Scalia, writing for the majority,⁵² found that the FCC was within its authority when it made rules regarding intrastate rates. Although the 1934 Act created a distinction between interstate and intrastate regulation, leaving intrastate regulation primarily to the states, the Court found that inserting the 1996 Act into the text of the 1934 Act redefined the FCC's jurisdiction: "Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control."⁵³ Justice Scalia reasoned that once the 1996 Act was found to extend the FCC's authority into local competition, then the FCC was empowered to make any local competition rules it chose under its section 201(b) general rulemaking authority.⁵⁴ Justice Scalia further found that although section 252(c)(2) of the 1996 Act specifically provides that a state commission shall "establish any rates for interconnection, services,

46. *See id.*

47. *See id.* at 796.

48. *Id.* (citing *Louisiana PSC*, 476 U.S. at 377).

49. *See* 47 U.S.C. § 276(b)(1)(A) (1994) (requiring the FCC to establish a compensation plan regarding both intrastate and interstate pay phone calls).

50. *See id.* § 543(b)(1) ("The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable.").

51. *See Iowa Utils. Bd.*, 120 F.3d at 797.

52. On jurisdictional issues, Justice Scalia was joined by Justices Ginsberg, Kennedy, Souter and Stevens. Justices Breyer, Rehnquist and Thomas dissented. Justice O'Connor did not participate in the case.

53. *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 731 n.8 (1999).

54. 47 U.S.C. § 201(b) (1994) ("the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.").

or network elements,"⁵⁵ establishing rates in this case could be interpreted to mean merely implementing the FCC's mandatory pricing methodology.⁵⁶

2. Justice Thomas's dissent

Justice Thomas disagreed with the majority's "wholesale" transfer of authority from the states to the FCC.⁵⁷ He emphasized that throughout the development of federal telecommunications policy, the states were given authority over intrastate matters as codified in section 152(b) of the 1934 Act.⁵⁸ The FCC's claim to general rulemaking authority failed because it did not demonstrate "unambiguous and straightforward evidence that Congress intended to eliminate section 152(b)'s substantive jurisdictional limitation"⁵⁹ as required by both the historical division of authority and the holding in *Louisiana PSC*.⁶⁰

Justice Thomas further argued that even if the FCC did have general rulemaking power, its pricing rules could not stand in the face of the 1996 Act's explicit grant of primary responsibility to the state commissions in approving interconnection agreements and its imposition of specific standards for setting prices.⁶¹ He concluded that the scope of the FCC's rulemaking authority was limited to the areas specifically granted to it in section 251, including number portability, number administration and the minimum availability standards for network elements.⁶² As section 251 makes no mention of pricing, however, he firmly rejected the majority's position that these provisions should be read as allowing states to set prices subject to strict guidelines from the FCC.⁶³

3. Justice Breyer's dissent

Justice Breyer's dissent built upon Justice Thomas's critique, suggesting several reasons why Congress's desire to create a new, pro-

55. 47 U.S.C. § 252(c)(2) (Supp. IV 1998).

56. See *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 732.

57. *Id.* at 741 (Thomas, J., dissenting).

58. *Id.* at 742.

59. *Id.* at 744.

60. See *id.* at 744 (internal quotations omitted) (giving examples of provisions which Congress had specifically exempted from the operation of section 152(b) in 1992).

61. See *id.* at 745.

62. See *id.* at 743.

63. See *id.* ("It seems to me that Congress consciously designed a system that respected the States' historical role as the dominant authority with respect to intrastate communications. . . . I simply do not think that Congress intended to limit States' authority to mechanically apply whatever methodologies, formulas, and rules that the FCC mandated.").

competitive local market environment with the 1996 Act implied neither FCC control of rates, nor the specific rates that the FCC chose. Justice Breyer argued that the importance of local geography and history, local regulators' familiarity with utilities' specific operations, costs and competitive environments, the fact that local regulators are often stakeholders in their local communities, and the pace of technological change, all operated in favor of local control of rates.⁶⁴ He further added that rate setting differences "can amount to the kind of 'experimentation' long thought a strength of our federal system."⁶⁵ Given the traditional status and eminent reasonableness of local rate setting, Justice Breyer argued, the section 252(c) and (d) grant of power to state commissions to establish rates ought to be read as confirming "the traditional allocation of ratemaking authority—an allocation that within broad limits assumes local rates are local matters for local regulators."⁶⁶

III. DISCUSSION

The *AT&T v. Iowa Utilities Board* majority overcomes traditional presumptions against federal preemption of state police power by claiming that the language of the 1996 Act explicitly grants intrastate rulemaking power to the FCC. However, the majority's claim that the plain meaning of the statute is clear is dubious given the numerous ambiguities the statute contains. The Court's decision to construe the statute in the FCC's favor seems rather to reflect the influence of some structural considerations, including burdens on the judiciary and a somewhat unusual application of the *Chevron* rule of deference to find that an administrative agency has the power to determine its own jurisdiction.

A. Preemption and Plain Meaning

Because section 252 seems to grant explicit authority to establish rates to state commissions, the question of whether the FCC has jurisdiction to issue pricing rules is at best ambiguous. As Justice Breyer notes, in cases of ambiguity both traditional preemption doctrine and the holding of *Louisiana PSC* favor state authorities over the FCC.⁶⁷ Federal law preempts or renders inoperative state law whenever there is a clear conflict between them.⁶⁸ This preemption can occur expressly, as when Congress explicitly

64. *See id.* at 748 (Breyer, J., dissenting).

65. *Id.*

66. *Id.* at 749.

67. *See id.* at 749-50.

68. Because of the operation of the Supremacy Clause. *See* U.S. CONST. art. VI, cl.

acts to overturn state law, or it can be implied when federal legislation occupies the entire available field, compliance with federal and state regulations is a physical impossibility, or because existing state law is "an obstacle to the accomplishment and execution of the full purposes and objective of Congress."⁶⁹ However, in areas where states have traditionally exercised their police power, Supreme Court preemption doctrine as developed over the last century contains a presumption in favor of preserving state power unless it is clearly preempted by federal law.⁷⁰ The Court's insistence in *Louisiana PSC* that the FCC requires an unambiguous Congressional grant of power in order to regulate in the state's traditional preserve of intrastate telephone service⁷¹ reinforces that presumption in the context of telecommunications regulation.

In spite of this presumption, and contrary to the 8th Circuit's ruling, the *AT&T v. Iowa Utilities Board* majority finds that the regulation of local competition was "unquestionably" taken away from the states with regard to matters addressed by the 1996 Act.⁷² Rather than basing its preemption analysis on evidence of legislators' desire to change the status quo with respect to local rate setting, or by offering structural reasons why the change would be advantageous, the majority pursues a forced plain-meaning analysis which presumes, rather than proves, that the local competition provisions constitute a pervasive "new federal regime."⁷³

The core holding of *AT&T v. Iowa Utilities Board* is that with the passage of the 1996 Act, section 201(b), which provides for such FCC rule-making authority "as may be necessary in the public interest,"⁷⁴ now extends the FCC's plenary power to intrastate as well as interstate service. It is not readily apparent that this should be so. First, section 201(b), which was not directly modified by the 1996 Act, was limited to interstate service by section 201(a)⁷⁵ in its original context under the 1934 Act. Second, although the 1996 Act clearly permits the FCC to have some control over local communications, it also clearly preserves some role for state commissions. Given what appears to be a system of dual jurisdiction over local competition, why should the plenary nature of the FCC's interstate power

69. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See generally *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

70. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

71. See *Louisiana Public Service Comm'n*, 476 U.S. 355, 374 (1986).

72. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 730 n.6.

73. *Id.*

74. 47 U.S.C. § 201(b) (1994).

75. See *id.* § 201(a) (stating that communication services subject to the Act are those which engage in "interstate or foreign communication by wire or radio").

necessarily serve as a sufficient ground for its total penetration into intra-state service, especially in the face of traditional state authority?

The Court's simple but unsatisfying answer is to turn to the language of the statute: "[w]e think that the grant in §201(b) means what it says: The FCC has rulemaking authority to carry out the provisions of this Act."⁷⁶ The majority offers no legislative history or policy arguments for this broad extension of FCC power; instead it hangs its argument on the plain meaning of a provision which has never heretofore meant what the majority states that it means.⁷⁷ This absence of substantive arguments in favor of FCC power undercuts the plausibility of the majority's interpretation of the statutory language, especially when compared to the dissenters' numerous policy arguments in favor of continued state control. This pattern of unsupported arguments by the majority contrasted with specific reasons offered by the dissenters for their position continues throughout the opinion. Without a firm basis in structure or policy, the legitimacy of the majority's decision becomes questionable; it would be much more convincing if it had offered a clear rationale for its position.

The majority's reliance on less than formidable arguments is apparent in the way it disposes of the section 152(b) presumption against preemption of state authority by reading that section as a provision which operates only as a total bar on federal action. Because "Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control,"⁷⁸ the majority reasons that the section 152(b) prohibition is breached and that the FCC can make any rules it wants, regardless of existing state rules or procedures. No explanation is offered for why taking exclusive control away from the states implies that the FCC should have it instead, nor does the majority attempt to show such a change of control was Congress's intention.

It is equally plausible to conceive of section 152(b) as a flexible constraint on FCC power, rather than an all-or-nothing barrier, as does the

76. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 730.

77. Interestingly, the FCC claimed in the First Report and Order that courts had interpreted 201(b) authority as "expansive" and "something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." *First Report and Order*, *supra* note 32, ¶ 96. However, the cases that it cited for that proposition are only tenuously related to the question at hand. See *FCC v. National Citizens for Broadcasting*, 436 U.S. 775, 794 (1978) (holding that the FCC's power to regulate common ownership of a radio or television station and daily newspaper in the same market is permissible even though the Act refers only to "communication by wire or radio"); *Fulani v. FCC*, 49 F.3d 904, 909 (granting exceptional deference to an FCC disposition on equal time provision claims by political candidates).

78. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 731 n.8.

dissent.⁷⁹ In this view section 152(b) reflects Congress's ongoing recognition that states play important roles in the intrastate rulemaking process, even while permitting the FCC limited jurisdiction over some intrastate activities. Unlike the majority, the dissent supports its interpretation with evidence, pointing to historical sharing of authority between the FCC and the states and to the language of section 252(c) and (d) specifically granting pricing authority to the states as reasons why its interpretation makes sense.⁸⁰

Although section 251 only mentions the FCC in certain subsections, the majority insists that the FCC's authority extends to all of them. This reflects the majority's belief that the local competition provisions are indivisible. Justice Scalia states that the language referring to Commission jurisdiction in section 251 reads "not like conferrals or authority, but like references to the exercise of authority conferred elsewhere (we think of course in 201(b))."⁸¹ He further notes that to accept the dissent's assertion that power is granted to the FCC in section 251 only when it is specifically mentioned "produces a most chopped up statute, conferring Commission jurisdiction over . . . curious and isolated matters . . . but denying Commission jurisdiction over much more significant matters. We think it most unlikely that Congress created such a strange hodgepodge."⁸² Again, it seems odd that the majority premises its position on what is basically an aesthetic argument, rather than offering concrete reasons why the FCC should have plenary authority.⁸³ On the other hand, if local competition provisions are conceived as separable, Justice Breyer furnishes numerous reasons why it might make sense for the states to be allowed to regulate specifically in the area of rates.⁸⁴

What may be the least convincing part of the majority opinion is its interpretation of the language specifically instructing the state commissions to establish rates (and the lack of any such mention of the FCC) to mean that the FCC sets the rates within an extremely narrow band and the state merely implements them.⁸⁵ Justice Breyer vehemently disagreed with

79. See *id.* at 745 (Thomas, J., dissenting); 748-49 (Breyer, J., dissenting).

80. *Id.*

81. *Id.* at 731.

82. *Id.*

83. The aesthetic argument is even stranger given Justice Scalia's statement, later in the opinion, that the 1996 Act "is in many important respects a model of ambiguity or indeed even self-contradiction." *Id.* at 738.

84. See *supra* text accompanying notes 64-66.

85. *Id.* at 732 ("The FCC's prescription, through rule making, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing Standards" set forth in §252(d). It is the States that will apply these standards

the majority's view that the FCC is not actually establishing rates in the fashion traditionally reserved to the states, but instead giving a federal gloss to the "just and reasonable" price provisions of section 252(c) and (d).⁸⁶ He states that, far from being mere guidelines, the FCC rules are "highly specific and highly detailed [and] deprive state commissions of methodological leeway"⁸⁷ and represent "a policy-oriented effort to choose among several different systems."⁸⁸

B. Pushing the Limits of *Chevron* Deference—Should Agencies be Allowed to Interpret Their Own Jurisdiction?

After considering the jurisdictional issues, the Court in *Iowa Utilities Board* examines the validity of other challenged FCC determinations.⁸⁹ Because these are areas where the FCC has uncontested rulemaking power under the 1996 Act, the Court addresses them by means of the *Chevron* rule.⁹⁰ *Chevron* held that where Congress has not directly spoken on an issue, an agency's "construction of a statutory scheme it is entrusted to administer" is entitled to a deferential standard of review: the court asks only whether the agency's decision was reasonable or not.⁹¹ *Chevron* assumes that regulatory agencies unavoidably face unforeseen circumstances and details which Congress has not investigated. In order to regulate effectively, agencies must be able to fill gaps and maintain flexibility.⁹² Furthermore, they must be able to do this with minimal interference from the courts. Congress relies on the agencies' technical and policy making competence and expertise, and there is no reason courts, composed of non-experts who are not politically accountable, should undertake a de novo review of all the factors involved in agencies' decisions.⁹³

The last paragraph of the majority opinion seems to extend the principle of *Chevron* deference to the FCC's determination of its own jurisdiction:

and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.").

86. *Id.* at 751 (Breyer, J., dissenting).

87. *Id.*

88. *Id.*

89. The Court examined primarily the question of which network elements the ILECs should be forced to provide on an unbundled basis. *See id.* at 733-38.

90. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

91. *Id.* at 844.

92. *See id.* at 843.

93. *See id.* at 865-66.

The 1996 Act can be read to grant . . . most promiscuous rights to the *FCC vis-à-vis the state commissions* and to competing carriers vis-à-vis the incumbents—and the Commission has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency. . . . We can only enforce the clear limits that the 1996 Act contains.⁹⁴

In other words, the Court seems to suggest that the FCC, as the implementing agency, gets to “resolve” the question of whether it has authority to regulate in the first place, subject only to the requirement of reasonableness.⁹⁵ As a general rule this approach is problematic because it allows Congress to effectively delegate a jurisdictional decision to an agency—a questionable course of action. When an agency claims that its rulemaking authority grants it jurisdiction it is easy for courts to substitute acceptance of the agency’s logic for an independent examination of Congressional purpose; this decreases Congressional accountability.

Congress may have deliberately left the question of who was to administer certain aspects of the 1996 Act unanswered. The 1996 Act clearly mandated an opening of local markets, regardless of who was given the authority to regulate that opening.⁹⁶ The FCC interpreted the Act to give it power over rate setting. But where Congress is ambiguous, or for that matter agnostic, about jurisdictional authority, the usual presumption is that an agency determination should normally not be able to supersede traditional state police powers.⁹⁷ In this case, however, structural considerations, especially the argument that vesting authority in the states will

94. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 738 (emphasis added) (internal quotations omitted).

95. While the Court as a whole does not appear to have ever directly addressed this issue, this is almost certainly Justice Scalia’s personal view. In a case which considered the authority of the FERC to take certain actions, Justice Scalia maintained that “the rule of deference applies even to an agency’s interpretation of its own statutory authority or jurisdiction . . . [because] . . . Congress would neither anticipate nor desire that every ambiguity in statutory authority would be addressed, de novo, by the courts.” *Mississippi Power and Light Co. v. Mississippi*, 487 U.S. 354, 381-82 (1988) (Scalia, J. concurring).

96. Like most legislation, the 1996 Act represents a series compromises between interest groups—to ask Congress to consider ex post the question of who has authority will upset the delicate balance of compromises which makes it work. One of the most interesting questions posed by this case is whether the local competition provisions would have passed if the interested parties knew ex ante how authority was eventually going to be allocated by the FCC and the courts. Perhaps the ambiguity that causes the problem in this case is not only intentional on the part of Congress, but necessary.

97. See *supra* notes 68-70 and accompanying text.

lead to further litigation rather than repose, militate against that presumption.

One argument for the necessity of federal control in order to achieve substantial deregulation posits an interdependence of interest between state PUCs and ILECs; their historical relationship of comity will cause the PUCs to favor the ILECs when they set rates. In this view, “[j]urisdiction to dictate pricing methodology may be the most potent tool by which the FCC can prod laggard states loath to undertake the politically unpleasant task of deregulating the local exchange.”⁹⁸ Perhaps this view is supportable given the alignment of parties in this litigation.

On the other hand, the same ends could be achieved if the FCC dictated general guidelines for “just and reasonable” prices and let the states implement them with federal agency or court approval. In spite of the Supreme Court’s comment that “a federal program administered by 50 independent state agencies is surpassing strange,”⁹⁹ this sort of “cooperative federalism” characterizes many laws¹⁰⁰ and arguably is a central part of the scheme of the reorientation of telecommunications regulation section of the 1996 Act. Justice Breyer’s dissent enumerated some advantages that limited deference to the states in a such scheme might have: state control allows for attention to local conditions and enables experiments to see how successful different pricing regimes are in practice before making final determinations.¹⁰¹

The Court’s primary critique of the cooperative federalism approach is that giving pricing authority to the state commissions will burden the federal judiciary and force the courts to engage in policy making. If the Eighth Circuit decision were followed, state PUCs, rather than the FCC, would have control over prices. District courts will be forced to rule state-by-state on whether each PUC is adhering to the general pricing methodology standards set forth in the 1996 Act. If district courts rigorously scrutinize the fairness of the states’ individually-determined rates, they will undoubtedly come to different conclusions, which will in turn have to be resolved in each circuit and ultimately by the Supreme Court. In addition to the protracted litigation and uncertainty this would cause, the federal standard that would ultimately emerge would have been crafted by the

98. Jim Chen, *TELRIC in Turmoil, Telecommunications in Transition: A Note on the Iowa Utilities Board Litigation*, 33 WAKE FOREST L. REV. 51, 54 (1998).

99. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 730 n.6.

100. See e.g., Philip Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1, 3 n.8 (1999) (noting, for example, Medicaid and many environmental laws).

101. See *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 748 (Breyer, J., dissenting).

judiciary. It is on these grounds that Justice Scalia objects to Justice Breyer's framing of the case as a states' rights question, saying instead, "it will be the FCC or the federal courts that draw the lines to which [the states] must hew."¹⁰² Judicial policy-making is something that the 1996 Act definitely sought to avoid.¹⁰³

Of course, finding for the FCC is not the only way to keep courts from making policy. Another possibility is to extend *Chevron* deference to the "reasonable" interpretations of state agencies operating under federal guidance. The 8th Circuit's decision envisioned a regime where the FCC had broadly entered intrastate rulemaking but left some important areas up to state commissions. However, the Court finds this approach and "the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law" too novel, and discards them.¹⁰⁴ Presumably, the Court would require a clearer statement of congressional intention before undertaking action it considers so extraordinary.¹⁰⁵

There are other practical problems with the level of deference that the Court does not mention. Justice Breyer advocated state control as a means for experimentation, but once control is in the hands of the states, the proliferation of standards is very difficult to control. The advantage of leaving control in the hands of the FCC is that its solutions, although monolithic, are easier to modify and more directly accountable to Congress and the national political process. Also, the pricing standards are designed not only to facilitate local competition but also to create the minimum conditions for the ILEC's participation in the long distance market via the "competitive checklist" of section 271.¹⁰⁶ The potential inequity of different local pricing regimes on new market entrants pales in comparison to

102. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 730 n.6.

103. At one point the legislative history of the 1996 Act, invoking the difficulties of the judicial administration of the *MFJ*, claimed its purpose was "to end government by consent decree." H.R. REP. NO. 104-230, at 201 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 215, *cited in* Weiser, *supra* note 100, at 28 n.106.

104. *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 733.

105. However, one commentator points out that some form of *Chevron* deference to state administrative decisions may be an unavoidable part of the 1996 Act's structure. Even if the states do not set default pricing methodologies, they still establish the actual rates and pass on the validity of negotiated interconnection agreements. Their decisions can be challenged in the courts, which will face a choice between relying on the expertise of the state agencies and making an independent judgment. Most of the same factors that make *Chevron* necessary for federal administrative behavior will weigh against a *de novo* review of state administrative judgments as well. *See* Weiser, *supra* note 100, at 21-23.

106. *See* 47 U.S.C. § 271(c)(2)(B) (Supp. IV 1998).

the unfairness of allowing ILECs into the long distance markets on what would essentially be different conditions.

C. Considering the Ultimate Validity of TELRIC.

The most immediate practical effect of Court's decision is that the Eighth Circuit must consider the validity of TELRIC on remand. Although the merits of TELRIC are certainly debatable,¹⁰⁷ it will probably be approved. Because the Court has determined that the FCC has jurisdiction, the 8th Circuit will probably consider TELRIC under the reasonableness standard of *Chevron* or the arbitrary and capricious standard of the Administrative Procedures Act.¹⁰⁸ ILECs' inability to recover stranded costs can be justified in several ways. The FCC argued that prices based on TELRIC are not meant to be final but are, rather, intended as a framework to stimulate private negotiation. New market entrants lack bargaining power, and the FCC felt that default pricing rules favoring them were necessary to give them leverage in negotiation.¹⁰⁹ Therefore, ILECs can negotiate rates more favorable than TELRIC by giving potential competitors better terms in other areas of their agreements. Another argument is that the consideration for the loss of the stranded costs is the ILECs' newly granted ability to compete in long distance markets. In theory, this should more than make up for the losses suffered in the local market over time. A final argument is not really a justification for unfairness so much as an acknowledgement that stranded costs are an unfortunate but necessary side effect of imposing competition and that the Court is willing to sanction them in the greater interests of competition. TELRIC will not be thrown out on remand under the *Chevron* rule unless it is found to be completely unreasonable.

IV. CONCLUSION

The Court's decision in *AT&T v. Iowa Utilities Board* is driven by a sense that Congress's desire for results should be its paramount concern. Ultimately, the Court is willing to cut against the grain of traditional allocations of power, telecommunications preemption precedent and the plain meaning of the statute itself in order to implement Congress's local competition regime quickly and efficiently. In the Court's judgment, it is more

107. See, e.g., Breyer's dissent in *AT&T v. Iowa Utils. Bd.* 119 S. Ct. at 746-53; Chen, *supra* note 98, at 88-92; Weiser, *supra* note 101, at 46-49.

108. See 5 U.S.C. § 706(2)(A) (1994) (requiring that agency actions should be set aside only when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

109. *First Report and Order*, *supra* note 32, ¶ 47.

important that something get done than who does it, in spite of the pressure this puts on existing doctrine.

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