



National Congress of American Indians

# NCAI News

August 27, 2002  
(Broadcast #02-062)

## **FCC Denies Cheyenne River Sioux Tribe Telephone Authority Petition on Exchange Sales**

On August 21, the Federal Communications Commission released a Memorandum Opinion and Order denying a joint petition that sought to reverse a decision by the South Dakota Public Utilities Commission to deny the proposed sale of three telephone exchanges by US West to the Cheyenne River Sioux Tribe Telephone Authority.

The FCC's opinion, while purporting to avoid a discussion of federal Indian law, in many respects creates a practical barrier to the exercise of tribal regulatory authority over telecommunications services. The full text of the opinion is available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-02-222A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-222A1.pdf).

### **Background**

The Communications Act of 1934, as amended<sup>1</sup> in 1996, adopted a new policy of unconditionally removing all legal and economic impediments to the provision of competitive local exchange services at the earliest time possible. Under the 1996 amendments, Congress sought to deregulate the telecommunications field and permit market forces to determine the provision of telecommunications services. In the event the FCC determines that a state law constitutes a barrier to entry, the Act requires preemption of such state law. The Communications Act allows tribes to compete with others in the provision of telecommunications services to reservation and Native Village communities, specifically by prohibiting any state attempt to impede competition.

In 1994, shortly after US West announced the proposed sale of 67 exchanges in South Dakota to a consortium of 20 telecommunications companies (including the Cheyenne River Sioux Tribe Telephone Authority), the South Dakota legislature enacted a law requiring that such sales be approved by a vote of the Public Utilities Commission. Under the state law, a separate vote is required on the sale of each exchange and, in voting, the Commission must consider the "protection of the public interest, the adequacy of local telephone service, the reasonableness of the rates for local service, the provision of 911, Enhanced 911, and other public safety services, the payment of taxes, and the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will promote economic development, tele-medicine, and distance learning in rural South Dakota."<sup>2</sup>

In 1995, the South Dakota Public Utilities Commission approved, subject to certain conditions, the sale of 63 of the 67 exchanges, denying only the sale of the three exchanges to the Cheyenne River Sioux Tribe Telephone Authority. In doing so, the Public Utilities Commission concluded that it lacked authority to approve the sale and to enter into a tax agreement with a tribal entity, and, therefore, approval of the sale would have significant, adverse tax consequences.

US West and the Telephone Authority appealed the decision to the Circuit Court of South Dakota, which

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<sup>1</sup> P.L. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.)

<sup>2</sup> S.D. Codified Laws § 49-31-59

concluded that the Commission's jurisdiction over the proposed sales was not preempted by federal law and that the rights of the Tribe to make its own laws were not unlawfully infringed on. The Court did find that the denial of the sales had been erroneously based on the Telephone Authority's decision not to waive its sovereign immunity, that the Commission had incorrectly concluded that the sale would constitute an improper delegation of its authority, and that the Commission had failed to analyze the sale based on the criteria outlined under state law. As such, it remanded the decision to the Commission for reconsideration, stating the Commission could consider the effects of immunity if relevant under the statutory criteria set forth in S.D. § 49-31-59.

On remand, the Commission again denied the proposed sale based on a finding that it would not be in the public interest because the Commission lacked numerous tax and regulatory authority and enforcement mechanisms over the Telephone Authority.

Following this decision, the Telephone Authority and US West appealed to the SD Circuit Court and to the SD Supreme Court, both of which affirmed the Commission's action. In its ruling, the SD Supreme Court held that the Commission's regulation of US West was not an improper infringement on the Tribe's right to self-government and found that congressional and legislative authority allowed the Commission to regulate the activities of US West and its sales of exchanges both on and off-reservation. The Court also disagreed with the claim that the Commission's authority to approve the on-reservation portion of the sale was preempted by federal interests in promoting economic development and tribal self-sufficiency and that the Commission's assertion of jurisdiction over this portion of the sale did not violate principles of federal Indian law. The Court also found that Commission properly applied the factors listed under S.D. § 49-31-59 when considering the sale of the off-reservation portions of the sale, and it rejected the claim that the refusal to approve the sale constituted a denial of equal protection.

### **FCC Ruling**

After the SD Supreme Court ruling, US West and the Telephone Authority petitioned the FCC to reverse the Commission's denial of sale under Section 253 of the Communications Act. Subsection 253(a) generally precludes state or local statutes or requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Subsection 253(d) requires the FCC to preempt such statutes or requirements unless saved by the provisions of subsection 253(b), which provides that nothing in section 253 shall affect the ability of a state to impose competitively neutral requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Essentially, US West and the Telephone Authority argued for preemption, stating that the application of S.D. § 49-31-59 discriminates against tribes that possess sovereign immunity and that it poses a barrier to tribal entities that seek to own and operate telephone exchanges in South Dakota. The FCC ruled that preemption was not warranted because "a state's ability to protect consumers under its regulatory authority is particularly important where consumers have only one choice of telecommunications carrier<sup>3</sup>" and because of the state's interest in protecting non-Indian consumers. The FCC also determined that the SD Commission's reasons for denying the sale "fall within core regulatory functions of rate regulation and other consumer protection mechanisms that are traditionally exercised by the states."<sup>4</sup> In addition, the FCC found that the SD Commission applied S.D. § 49-31-59 in a manner that is competitively neutral and consistent with federal law. Finally, the FCC did not address whether the application of S.D. § 49-31-59 violated federal law promoting tribal sovereignty and self-government, stating that it saw no reason to re-litigate these issues.

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<sup>3</sup> FCC 02-222, page 15

<sup>4</sup> FCC 02-222, page 15

It is important to note that two FCC Commissioners filed separate statements that are generally supportive of tribal governments. First, Commissioner Abernathy wrote that, while she agrees that the record in the proceeding did not support a finding of preemption, she wanted to “emphasize . . . that tribal authorities should not be forced to forfeit their sovereign immunity as a condition of purchasing a local exchange.<sup>5</sup>”

Commissioner Copps, in a partial dissension, stated that he did not believe that the decision struck the correct balance between consumer protection and tribal sovereignty. He also stated that, as applied by the SD Commission, S.D. § 49-31-59 creates a barrier to entry to tribally-owned telephone companies and is not competitively neutral. Finally, Commissioner Copps reiterated comments filed by the Department of Justice that the state could have entered into a regulatory and tax agreement with the Tribe to address the issues raised by the proposed sale without harming tribal sovereignty.

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<sup>5</sup> FCC 02-222, Separate Statement of Commissioner Kathleen Q. Abernathy, page 1