

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Cheyenne River Sioux Tribe Telephone Authority and U S WEST Communications, Inc., and Joint Petition for Expedited Ruling Preempting South Dakota Law, Memorandum Opinion and Order, CC Docket No. 98-6 (rel. Aug. 20, 2002).

I agree that the record in this proceeding does not support a finding of preemption under section 253 of the Act. I want to emphasize, however, that tribal authorities should not be forced to forfeit their sovereign immunity as a condition of purchasing a local exchange. The record suggests that the refusal of the Cheyenne River Sioux Tribe Telephone Authority to waive its sovereign immunity may have been the primary reason the South Dakota Public Utilities Commission would not approve the Telephone Authority's purchase of the U S WEST exchanges. Indeed, the U.S. Department of Justice and Department of the Interior contend that the "underlying, unspoken basis for [the] denial was the Tribe's refusal to waive its sovereign immunity."¹

Nevertheless, the South Dakota Supreme Court squarely held that the PUC's denial of the proposed transfers was *not* based on the Telephone Authority's refusal to waive sovereign immunity, and thus did *not* violate federal law favoring tribal self-governance.² Whether or not we agree with that holding — which petitioners did not appeal to the U.S. Supreme Court — we are legally barred from relitigating it here.³

If we refrain from second-guessing the court's findings, as we must, then we are constrained to hold that the state commission's denial of the proposed transfers did not run afoul of section 253. I begin with the assumption that the state law at issue (section 49-31-59) "prohibit[s] or has the effect of prohibiting" the Telephone Authority from providing telecommunications service. 47 U.S.C. § 253(a).⁴ The question then becomes: Was section 49-31-59 as applied necessary to promote any of the public interest goals enumerated in section 253(b)? If I were writing on a blank slate, I might find that denying the transfers was not necessary to further any of those goals, because I have no reason to believe that the Telephone Authority would not provide excellent service. But

¹ Ex Parte Comments of the United States Department of Justice and the United States Department of the Interior at 3 (filed Jan. 19, 2000).

² *Cheyenne River Sioux Tribe Telephone Authority v. Pub. Utils. Comm'n of South Dakota*, 595 N.W.2d 604, 609-11 (S.D. 1999).

³ See, e.g., *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993) (applying doctrine of issue preclusion).

⁴ The *Texas Preemption Order*, for example, held that section 253(a) bars state commissions from relegating putative entrants to particular modes of entry, which suggests that denying permission to purchase an exchange constitutes a "prohibition" under section 253(a). See *The Public Utility Comm'n of Texas; The Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corp., and MFS Communications Co., Inc.; Teleport Communications Group, Inc.; City of Abilene, Texas; Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCB Pol. 96-13, 96-14, 96-16, and 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460 para. 74 (1997).

the state PUC had several significant concerns regarding the proposed transfers. And given the South Dakota Supreme Court's holding that the PUC "properly applied the statutory factors,"⁵ and, consequently, that it appropriately "determined that the sales would not be in the public's best interest,"⁶ I believe it would overstep our bounds to use section 253 as a collateral means of overturning this judgment.

Moreover, even if the record provides some support for petitioners' arguments, they bear a heavy burden in arguing that the state PUC lacks authority to deny the transfers at issue. As the South Dakota Supreme Court noted, "[t]he authority of the PUC is extensive and crucial to the overall regulatory scheme."⁷ While section 253's preemptive reach is broad in scope, neither this Commission nor any court has ever remotely suggested that it precludes state commissions from regulating the transfer of facilities owned by a carrier of last resort.

If, in the future, tribal authorities are denied permission to acquire exchanges solely because of their unwillingness to waive sovereign immunity, I hope they will challenge such rulings as inconsistent with federal law protecting tribal self-sufficiency.⁸ I also believe that section 253 could conceivably provide a remedy in some circumstances. But if a tribe chooses to litigate the general federal preemption question in state court, obtains a fair hearing, and receives a final judgment, then section 253 should not be turned into a vehicle to relitigate that question.

⁵ *Cheyenne River*, 595 N.W.2d at 612.

⁶ *Id.*

⁷ *Id.* at 609.

⁸ *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877 (1986).