Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Cheyenne River Sioux Tribe Telephone Authority and US WEST Communications, Inc.	)	CC Docket No. 98-6
	)	
	)	
Joint Petition for Expedited Ruling Preempting South Dakota Law	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 2002 **Released:** August 21, 2002

By the Commission: Commissioner Abernathy issuing a statement; Commissioner Copps concurring in part, dissenting in part, and issuing a statement.

I. INTRODUCTION

1. On January 22, 1998, the Cheyenne River Sioux Tribe Telephone Authority (Telephone Authority) and US WEST Communications, Inc. (US WEST)[1] filed a joint petition requesting that the Federal Communications Commission (FCC) exercise its authority under section 253 of the Communications Act of 1934, as amended (Communications Act or Act),[2] to preempt section 49-31-59 of the South Dakota Codified Laws (section 49-31-59)[3] as applied to the Telephone Authority and to Indian Tribes or tribal entities.[4] Specifically, the Telephone Authority and US WEST (Petitioners) contend that the South Dakota Public Utilities Commission's (South Dakota Commission) disapproval of the proposed sale of three South Dakota telephone exchanges by US WEST to the Telephone Authority pursuant to section 49-

[1] In July 2000, US WEST merged with, and became, Qwest Communications International, Inc. *See Qwest Communications International Inc. and U S West, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, CC Docket 99-272, Memorandum Opinion and Order, 15 FCC Rcd 11909 (2000).

[2] 47 U.S.C. §253. Section 253 was added to the Communications Act of 1934 by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* All citations herein to the 1996 Act will be to the 1996 Act as codified in Title 47 of the United States Code.

[3] S.D. CODIFIED LAWS §49-31-59.

[4] The Cheyenne River Sioux Tribe and U S West Communications, Inc.'s Joint Petition for Expedited Ruling Preempting South Dakota Law, filed January 22, 1998 (Joint Petition).

31-59 "prohibit[s] or ha[s] the effect of prohibiting the ability of" Indian tribes and tribal entities from providing telephone exchange services in South Dakota, and, therefore, constitutes a barrier to entry within the meaning of section 253(a) of the Communications Act.[5] Petitioners further contend that the application of section 49-31-59 exceeds the authority reserved to South Dakota under section 253(b) of the Communications Act and thus satisfies the requirements for preemption pursuant to section 253(d) of the Act.[6] Petitioners also contend that the South Dakota Commission's application of section 49-31-59 is preempted by operation of federal law and policy that promotes tribal sovereignty and self-government.[7] On January 28, 1998, the FCC issued a Public Notice seeking comment on the issues raised by Petitioners.[8]

2. For the reasons described below, we reject the South Dakota Commission's procedural claim that a decision of the South Dakota Supreme Court that affirmed the South Dakota Commission's disapproval of the sales precludes the FCC from considering the section 253 issue raised by the Petitioners. We therefore address the section 253 issue and conclude that the application of section 49-31-59 is not preempted under section 253. Specifically, and assuming arguendo that the state's requirements should be deemed a barrier to entry under section 253(a), we conclude that the state's action is not preempted because it falls within the class of regulations that are permissible under section 253(b). Finally, we do not address here whether the South Dakota Commission's decision is preempted by federal law promoting tribal sovereignty and self-government, given that the South Dakota Supreme Court has already rejected Petitioners' preemption claim.[9]

II. BACKGROUND

3. In 1994, US WEST agreed to sell 67 exchanges located in South Dakota to a consortium of 20 telecommunications companies, which included the Telephone Authority.[10] The Telephone Authority is a wholly owned subsidiary of the Cheyenne River Sioux Tribe, a

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5 Joint Petition at 2, 10-13.

6 Joint Petition at 10-13.

7 Joint Petition at 13-17.

8 *Commission Seeks Comment on Cheyenne River Sioux Tribe Telephone Authority's and U S West's Joint Petition for Preemption Pursuant to Section 253,* Public Notice, CCB Pol 98-6, DA 98-145 (rel. Jan. 28, 1998) (Public Notice). Five parties filed comments in response to the Public Notice. The South Dakota Commission filed comments opposing the Joint Petition. Three other parties, the Fort Mojave Indian Tribe and Fort Mojave Telecommunications, Inc. (collectively, Fort Mojave), the National Telephone Cooperative Association (NTCA), and the Standing Rock Sioux Tribe (SRST) also filed comments in support of the Joint Petition. Petitioners filed reply comments. On September 30, 1999, the Attorney General of the State of South Dakota submitted an *ex parte* letter. On January 19, 2000, the Environment and Natural Resources Division, Indian Resources Section of the United States Department of Justice and the United States Department of the Interior filed *ex parte* comments supporting the Joint Petition (DOJ *ex parte*). Petitioners filed several *ex parte* letters regarding their position.

9 *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, 595 N.W.2d 604 (S.D. 1999).

10 Joint Petition at 11, n. 3.

federally recognized Indian tribe, and provides service primarily within the exterior boundaries of the Cheyenne River Sioux Reservation in South Dakota.[11]

4. Under the proposed sales agreements, US WEST agreed to sell three exchanges to the Telephone Authority. These exchanges include: McIntosh, which serves the City of McIntosh and surrounding farms and ranches; Morristown, which serves the City of Morristown and surrounding areas; and Timber Lake, which serves the City of Timber Lake and surrounding areas. Approximately half of the Timber Lake exchange is within the boundary of the Cheyenne River Sioux Reservation. The remaining portion of that exchange and all of the McIntosh and Morristown exchanges are within the exterior boundaries of the Standing Rock Sioux Reservation.[12] The activities of US WEST associated with its ownership and operation of the three exchanges are regulated by the South Dakota Commission.[13] Upon consummation of the exchange sales agreement, the Telephone Authority, through its subsidiary, Owl River, would replace US WEST providing service on those portions of the Reservations served by the exchanges.[14]

5. Shortly after US WEST and the consortium announced the proposed sales, the South Dakota legislature enacted section 49-31-59 which provides:

> The Legislature recognizes that the sale of telephone exchanges has a profound impact upon South Dakota, especially during a time when the

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[11] The Telephone Authority is the parent company of Owl River Telephone, Inc. (Owl River), a state-chartered, tribally-owned entity of the Cheyenne River Sioux Tribe. Upon consummation of the transactions Owl River would operate the exchanges. Despite efforts to settle the issues raised in the Joint Petition, the Telephone Authority and the Attorney General of South Dakota were unable to agree upon the jurisdictional standing of, and the ability of the State of South Dakota to enforce judgments against, Owl River. Consequently, the Telephone Authority declared the efforts to settle the matter "finished" and asked the FCC "to consider the merits of the Joint Petition and decide whether § 253 . . . preempts South Dakota law prohibiting the Telephone Authority from purchasing three telephone exchanges from US WEST." *See* Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (July 19, 2000).

[12] The Standing Rock Sioux Tribe issued the Telephone Authority a tribal provisional certificate of convenience and necessity to operate that portion of the exchange located within the exterior boundaries of the Standing Rock Sioux Reservation. Within the exterior boundaries of both Reservations reside members of the Cheyenne River Sioux Tribe, members of the Standing Rock Sioux Tribe, non-member Indians, and non-Indians. In the City of Timber Lake, which is served by the Timber Lake Exchange, two-thirds of the population are non-Indians. Comments of the South Dakota Public Utilities Commission Opposing the Joint Petition of the Cheyenne River Sioux Tribe Telephone Authority and US West Communications, Inc. for an Expedited Ruling Preempting South Dakota Law, filed February 27, 1998 (SDC Comments), at 3-5.

[13] *See* Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (August 23, 1999), at 1.

[14] *See* Letter from Alice E. Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (August 23, 1999) at 2.

> world is undergoing a revolution in telecommunications technology. Because the sale of any exchange in our state directly affects the continued vitality and viability of rural South Dakota during that revolution, it is the Legislature's intent that the sale of each exchange be held to a high degree of scrutiny. Any sale of a telecommunications exchange shall be approved by a vote of the Public Utilities Commission. A separate vote is required on the sale of each exchange. In voting, the commission shall, if applicable, 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 help promote economic development, tele-medicine, and distance learning in rural South Dakota.[15]

6. On July 31, 1995, after reviewing the proposed exchange sales, the South Dakota Commission approved, subject to certain conditions, the sale of 63 of the 67 exchanges.[16] These conditions required that the buyers not increase local rates for 18 months, not recover any acquisition adjustment through their rates or from federal or state universal service funds, honor all then existing US WEST contracts and agreements arising from the operation of the exchanges being sold, continue to offer all services offered by US WEST in the purchased exchanges, and not change any extended area service arrangements without prior South Dakota Commission approval.[17] In contrast, the South Dakota Commission denied US WEST's sale of the McIntosh, Morristown, and Timber Lake exchanges to the Telephone Authority.[18]

7. The South Dakota Commission addressed the three proposed exchange sales in three separate orders.[19] In each order, the South Dakota Commission made specific findings of

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[15] S.D. CODIFIED LAWS § 49-31-59.

[16] *See*, *e.g.*, *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Cos. in South Dakota,* Decision and Order Regarding Sale of the Bowdle Exchange, TC 94-122, at 10 (S.D. PUC July 31, 1995).

[17] *Id*. An acquisition adjustment is the difference between the price paid for an exchange and its net book value. An extended area service arrangement increases the area within which subscribers may make calls without incurring toll charges.

[18] The proposed buyer for the fourth exchange was a municipality that sought to operate an exchange located outside its boundaries, an activity for which it lacked power under state law. *See*, *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota,* Decision and Order Regarding Sale of the Alcester Exchange, TC 94-122, at 10 (S.D. PUC July 31, 1995).

[19] *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, Decision and Order Regarding Sale of the McIntosh Exchange, TC94-122, (S.D. PUC July 31, 1995)(*McIntosh I*); *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, Decision and Order Regarding Sale of the Timber Lake (continued….)

fact.[20] The South Dakota Commission concluded that approval of the sales would constitute an improper delegation of authority pursuant to South Dakota law and, therefore, the South Dakota Commission had no authority to approve the sale of the exchanges.[21] The South Dakota Commission further concluded that it lacked the authority to enter into a tax agreement with a tribal entity, and that approval of the sales would have significant, adverse tax consequences to the taxpayers located in the cities, counties, and school districts within the proposed sale exchanges due to the Telephone Authority's assertion that the state lacks the authority to enforce the collection of taxes on the Reservations.[22]

8. Petitioners appealed the South Dakota Commission's orders to the Circuit Court of South Dakota (South Dakota Circuit Court).[23] The South Dakota Circuit Court concluded that

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Exchange, TC94-122, (S.D. PUC July 31, 1995)(*Timber Lake I*); *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, Decision and Order Regarding Sale of the Morristown Exchange, TC94-122, (S.D. PUC July 31, 1995)(*Morristown I*), *aff'd in part and remanded in part sub nom. Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, Civ. No. 95-288 (S.D. Cir. Ct. Feb. 21, 1997) (*Cheyenne River I*), *on remand*, Amended Decision and Order Regarding Sale of the McIntosh Exchange (S.D. PUC Aug. 22, 1997) (*McIntosh II*), Amended Decision and Order Regarding Sale of the Timber Lake Exchange (S.D. PUC Aug. 22, 1997) (*Timber Lake II*), Amended Decision and Order Regarding Sale of the Morristown Exchange (S.D. PUC Aug. 22, 1997) (*Morristown II*), *aff'd sub nom, Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, Civ. No. 97-348 (S.D. Cir. Ct. Feb. 20, 1998)(*Cheyenne River II*), *aff'd*, *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, 595 N.W.2d 604 (S.D. 1999).

[20] The South Dakota Commission found that: (1) the Telephone Authority maintained that if the sale of the exchanges to the Telephone Authority were allowed, the Commission would lose all regulatory control over the exchanges; (2) the Telephone Authority refused to waive its sovereign immunity in order to provide the Commission with its statutorily mandated regulation of telecommunications services provided by a telecommunications company within the state of South Dakota; (3) the Telephone Authority refused to waive its sovereign immunity with regard to the gross receipts tax agreement and that the Telephone Authority had proposed to enter into negotiations with the state of South Dakota; (4) if the sale of the exchanges to the Telephone Authority were approved, the Telephone Authority would not recognize the Commission as having regulatory authority over the Telephone Authority and the exchanges; and (5) as the Telephone Authority declined to waive its sovereign immunity, the Commission similarly declines to give up its jurisdiction. The Commission also found that because the Telephone Authority maintains that there is no enforcement mechanism that would require the Telephone Authority to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue. *McIntosh I* at 5-6, Findings of Fact paras. 12, 16, 17, 20, 22, 23; *Timber Lake I* at 5-6, Findings of Fact paras. 12, 16, 17, 20, 22, 23; *Morristown I* at 5-6, Findings of Fact paras. 12, 16, 17, 20, 22, 23.

[21] *McIntosh I* at 7, Conclusions of Law para. 3; *Timber Lake I* at 7, Conclusions of Law para. 3; *Morristown I* at 7, Conclusions of Law para. 3.

[22] *McIntosh I* at 7, Conclusions of Law paras. 4, 5; *Timber Lake I* at 7, Conclusions of Law paras. 4, 5; *Morristown I* at 7, Conclusions of Law paras. 4, 5.

[23] *Cheyenne River I* (filed September 7, 1995). On October 24, 1995, after filing the appeal of the *McIntosh I* decisions to South Dakota Circuit Court, the Telephone Authority and US WEST sued the South Dakota Commission and the individual South Dakota Commissioners in Federal District Court for the District of South Dakota, asserting a deprivation of civil rights under 42 U.S.C. § 1983, and other claims similar to those then on appeal before the South Dakota Circuit Court. *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, No. 95-3035 (D.S.D. filed October 24, 1995). The parties agreed to dismiss the federal court proceedings because of the ongoing state circuit court proceedings addressing the same issues, other than the claim of a federal (continued….)

the South Dakota Commission's jurisdiction over the proposed sales of US WEST's exchanges was not preempted by federal law and that the Commission's exercise of jurisdiction over the proposed sales did not unlawfully infringe on the right of the Cheyenne River Sioux Tribe to make its own laws and be governed by them.[24] However, the court did find that the denial of the sales had been erroneously based on the Telephone Authority's refusal to waive its sovereign immunity, that the South Dakota Commission had erroneously concluded that approval of the sales would constitute an improper delegation of its authority, and that the South Dakota Commission had failed to analyze each of the criteria enumerated in section 49-31-59.[25] The South Dakota Circuit Court remanded to the South Dakota Commission for reconsideration, but stated that the South Dakota Commission could "consider the effects of immunity if relevant under the statutory criteria" in section 49-31-59.[26]

9. On remand, the South Dakota Commission reevaluated the proposed sales and again denied them.[27] The South Dakota Commission concluded that it had jurisdiction over US WEST and the Telephone Authority and found that approval of the sales would not be in the public interest because the South Dakota Commission lacked: (1) an enforcement mechanism to

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civil rights violation. On January 23, 1999, the Federal District Court dismissed the case without prejudice. *See* Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (August 20, 1999), at 2.

[24] *Cheyenne River I*, at 40-41. The court also found that South Dakota Commission's application of section 49-31-59 did not result in a denial of equal protection of the law nor did it unconstitutionally impair the contractual relationship between the Petitioners. *Id.* Further, the court found that the Commission's finding that the proposed sales would result in a significant tax loss to various governmental entities was not clearly erroneous, arbitrary, capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. *Id.*

[25] *Id.*

[26] *Id.* at 30, n.17. Petitioners filed a joint notice of appeal of the Circuit Court's finding of no federal preemption of state law. Notice of Appeal, *Cheyenne River Sioux Tribe Tel. Auth., et al. v. Public Utils. Comm'n of S.D.*, No. 95-288, (S.D. Cir. Ct. May 9, 1997). The parties subsequently stipulated to stay the appeal pending the remanded *McIntosh II* proceedings, which stipulation was approved by the South Dakota Supreme Court. *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, No. 20062 (S.D. June 17, 1997).

[27] The Telephone Authority had asked that the record be reopened so that the South Dakota Commission could consider, among other matters, the Telephone Authority's "efforts to comply with [the South Dakota Commission's] regulatory requirements." *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, Decision and Order Regarding Sale of the McIntosh Exchange, TC94-122, (S.D. PUC July 31, 1995) *on remand*, Amended Decision and Order Regarding Sale of the McIntosh Exchange (S.D. PUC Aug. 22, 1997) (*McIntosh II*), *supra* note 21 at 4; *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, Amended Decision and Order Regarding Sale of the Timber Lake Exchange, TC94-122, (S.D. PUC Aug. 22, 1997) (*Timber Lake II*), *supra* note 21, at 4; *Sale of Certain Telephone Exchanges by US WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota*, Amended Decision and Order Regarding Sale of the Morristown Exchange, TC94-122, (S.D. PUC Aug. 22, 1997) (*Morristown II*), *supra* note 21, at 4. The South Dakota Commission denied this request because the circuit court had remanded the case for consideration "on the record." *Id.* Ultimately, the South Dakota Supreme Court upheld the South Dakota Commission's action. *See infra* para. 17.

require the Telephone Authority to pay gross receipts taxes and there would be significant loss of tax revenue for the cities, counties, and school districts located within the exchanges (US WEST had paid gross receipts taxes on its revenue for those exchanges to South Dakota); (2) regulatory control to set conditions of sale that must be followed by the Telephone Authority; (3) the ability to require as a condition of sale that the Telephone Authority offer all existing US WEST services; (4) the ability to require the Telephone Authority to honor all existing US WEST contracts and agreements; (5) regulatory control and the ability of the majority of subscribers to vote or have a political voice in the Telephone Authority which could negatively affect adequacy of service; (6) the ability to require that the Telephone Authority not increase the current local rates for 18 months; (7) the ability to require that the Telephone Authority not change any current extended area service arrangements without prior approval by the South Dakota Commission; and (8) the ability to require the Telephone Authority to make any improvements necessary for the public's safety, convenience, and accommodation as allowed by South Dakota state law.[28] Petitioners appealed the denial of the sales to the South Dakota Circuit Court, which subsequently affirmed the South Dakota Commission's decision.[29]

10. On March 25, 1998,[30] the Petitioners appealed the South Dakota's Circuit Court's decision in *Cheyenne River II* to the South Dakota Supreme Court (South Dakota Supreme Court).[31] The South Dakota Supreme Court affirmed the South Dakota Commission's denial of US WEST's sale of the three exchanges.[32]

11. The South Dakota Supreme Court addressed first Petitioners' claims that the South Dakota Commission's assertion of jurisdiction over the sale of that portion of the Timber Lake exchange located on the Cheyenne River Sioux Indian Reservation infringed on the Tribe's right of tribal self-government, was barred by federal preemption, and violated well-established principles of federal Indian law.[33] The court held that the South Dakota Commission's regulation

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[28] *McIntosh II* at 8; *Timber Lake II* at 8; *Morristown II* at 8.

[29] *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, Order Affirming Findings of Fact and Conclusions of Law, Civ. No. 97-348 (S.D. Cir. Ct. Feb. 20, 1998).

[30] The Petitioners filed their section 253 preemption petition with the Commission on January 22, 1998.

[31] *Cheyenne River Sioux Tribe Tel. Auth., et al. v. Public Utils. Comm'n of S.D.*, No. 97-348 (S.D. Cir. Ct. Mar. 25, 1998) (Joint Notice of Appeal). The parties stipulated to consolidate this appeal with the stayed appeal of the Circuit Court's finding of no federal preemption. *Cheyenne River Sioux Tribe Tel. Auth., et al. v. Public Utils. Comm'n of S.D.*, Nos. 20062 and 20464, (S.D. Apr. 16, 1998) (Stipulation Consolidating Appeals for Purposes of Briefing and Submission).

[32] *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, 595 N.W.2d 604 (S.D. 1999)(*Cheyenne River v. South Dakota*).

[33] The Timber Lake exchange is distinguishable because "[a]pproximately one-half of the Timber Lake exchange is located within the boundaries of the Cheyenne River Sioux Indian Reservation. The remaining half of the exchange is located within the boundaries of the Standing Rock Sioux Indian Reservation." *Cheyenne River v. South Dakota* at 608, n.5. The Morristown and McIntosh exchanges are both completely within the boundaries of the Standing Rock Sioux Indian Reservation. *Id.* at 606, n.2.

of US WEST was not an improper infringement upon the Cheyenne River Sioux Tribe's right to self-government. The South Dakota Supreme Court found that extensive congressional and legislative authority authorized the South Dakota Commission to regulate the activities of US WEST and its sale of telephone exchanges, whether on or off the reservation.[34] The court opined that "[t]he regulatory scheme of telecommunications services specifically grants [the South Dakota Commission] authority and jurisdiction over intrastate facilities."[35] The court noted that this authority is extensive and crucial to the overall regulatory scheme[36] and included "'general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.'"[37]

12. The South Dakota Supreme Court rejected Petitioners' claim that because US WEST and the Telephone Authority had entered into a consensual, contractual agreement, the tribe had jurisdiction over US WEST's on-reservation activities in accordance with the exception to state jurisdiction over nonmembers of a tribe set out in *Montana v. United States*.[38] The court determined that US WEST's sale to the Tribe did not come under this exception because the contract for the purchase of the exchange was dependent upon the South Dakota Commission's approval of the sale, not upon the consensual agreement between US WEST and the Telephone Authority.[39]

13. The South Dakota Supreme Court also disagreed with Petitioners' contention that the South Dakota Commission's authority to approve the sale of the portion of the Timber Lake exchange located on the Reservation was preempted by "'federal interests in promoting economic development and self-sufficiency for Indian tribes.'"[40] The court found that Petitioners had failed to cite a specific federal statute that preempts the South Dakota Commission's authority or that encourages tribal regulation of telephone exchanges.[41] Moreover, the South Dakota Supreme Court also found that the primary purposes and objectives of Congress in regulating telecommunications are to protect telecommunications' consumers by ensuring adequate facilities and reasonable rates, and that the South Dakota Commission's regulatory authority furthers these objectives and does not interfere with them.[42]

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34 *Id.* at 609. *See Montana v. United States*, 450 U.S. 544 (1981).

35 *Cheyenne River v. South Dakota* at 609, *citing* 47 U.S.C. § 152(b).

36 *See, generally*, S.D. CODIFIED LAWS § 49-31.

37 *Cheyenne River v. South Dakota* at 609 *citing* S.D. CODIFIED LAWS § 49-31-3.

38 *Cheyenne River v. South Dakota* at 609-10.

39 *Cheyenne River v. South Dakota* at 610.

40 *Id.* at 610 *citing White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 143 (1980)

41 *Id.* at 610.

42 *Id.* at 611.

14. The South Dakota Supreme Court also determined that the South Dakota Commission's assertion of jurisdiction over the sale of the on-reservation portion of the Timber Lake exchange did not violate well-established principles of federal Indian law. Petitioners argued that the South Dakota Commission's disapproval of the sale was "implicitly based on the Tribe's failure to waive its sovereign immunity and therefore 'unduly burdesome,' 'overly intrusive,' and thus a violation of the United States Supreme Court's holding in *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*.[43] The South Dakota Supreme Court found that the South Dakota Commission had followed the remand instructions in *Cheyenne River I.* It had considered and denied US WEST's proposed sale of the three exchanges based upon findings of fact on each of the factors enumerated in section 49-31-59, not upon the Tribe's refusal to waive its sovereign immunity.[44]

15. After addressing Petitioners' claims with regard to the South Dakota Commission's jurisdiction over the sale of the of that portion of the Timber Lake exchange located on the Cheyenne River Sioux Indian Reservation, the South Dakota Supreme Court addressed Petitioners' claim that the South Dakota Commission's decisions should be reversed because the sales of the Morristown, McIntosh, and the off-reservation portion of the Timber Lake exchange satisfied the statutory requirements of section 49-31-59. The court disagreed, finding that the South Dakota Commission properly applied the factors listed in section 49-31-59 when considering the sale of the off-reservation portion of the Timber Lake exchange, the Morristown exchange, and the McIntosh exchange.[45]

16. The South Dakota Supreme Court also rejected Petitioners' claim that the refusal to approve the sales constituted a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution and Article VI, § 18 of the South Dakota Constitution.[46] Petitioners argued that the South Dakota Commission's reliance on the potential effect of the Telephone Authority's sovereign immunity caused it to treat the Telephone Authority disparately from other successful bidders when denying approval of the sale. The court determined that section 49-31-59 passes "rational basis scrutiny" and that the South Dakota Commission's application of the statute to the exchange sales did not constitute a denial of equal protection under the law.[47]

17. Finally, Petitioners argued that the South Dakota Commission and the South Dakota Circuit Court abused their discretion by failing to reopen the record on remand.

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[43] 476 U.S. 877 (1986).

[44] The Court noted that the Petitioners had conceded that the South Dakota Commission's "amended order regarding the sale of the Timber Lake exchange did not explicitly condition its disapproval of the sale on the Tribe's failure to waive its sovereign immunity." *Cheyenne River v. South Dakota* at 611, n.7.

[45] *Id.* at 612.

[46] The South Dakota Supreme Court analyzed the claims under applicable Constitutional standards to conclude that section 49-31-59 passed rational basis scrutiny. *Id.* at 612-14.

[47] *Id.* at 614.

Petitioners claimed that it was an abuse of discretion for the South Dakota Commission and the South Dakota Circuit Court to refuse to take judicial notice of the Telephone Authority's newly adopted dispute resolution procedures and the provisional certificate of convenience and necessity given to the Telephone Authority by the Standing Rock Sioux Tribe to operate the exchanges within the boundaries of the Standing Rock Sioux Reservation. The South Dakota Supreme Court disagreed. The South Dakota Supreme Court held that the South Dakota Circuit Court's order limiting the scope of the remand to the record before it and to the issues that the South Dakota Circuit Court determined the South Dakota Commission needed to address was within the scope of the South Dakota Circuit Court's discretion.[48] No appeal was taken to the United States Supreme Court.[49]

III. SECTION 253 PREEMPTION

A. Procedural Issues Relating to Section 253

18. As a preliminary matter, South Dakota challenges the FCC's jurisdiction to resolve whether section 49-31-59 is preempted under section 253. According to South Dakota, the South Dakota Supreme Court has already determined that the South Dakota Commission has authority over the transfers in question, and it believes that disposition is binding upon the FCC.[50] South Dakota supports its assertion with reference to the *Rooker-Feldman* doctrine which, it argues, prevents the FCC from ruling in favor of Petitioners.[51] South Dakota also contends that "under the doctrine of preclusion, a federal agency must give the preclusive effect to the state court determination of jurisdiction of the [South Dakota Commission]."[52]

19. We do not agree that the decision of the South Dakota Supreme Court in *Cheyenne River v. South Dakota* precludes our review of the sales of the exchanges under section 253.[53] The doctrine of preclusion applies in circumstances in which a court has

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[48] *Id.* at 614-15.

[49] Letter from Lawrence E. Long, Chief Deputy Attorney General, Office of Attorney General, State of South Dakota, to Magalie Roman Salas, Secretary, Federal Communications Commission (September 30, 1999) (South Dakota Attorney General *ex parte*) at 2.

[50] South Dakota Attorney General *ex parte* at 3-4.

[51] South Dakota Attorney General *ex parte* at 2-7. South Dakota states that the *Rooker-Feldman* doctrine stands for the propositions that a decision of a state court with regard to a federal question is conclusive unless overturned by the United States Supreme Court (*Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415 (1923)), and that if constitutional claims presented to a United States District Court are inextricably intertwined with a state court decision, the District Court may not entertain the claim (*District Court of Appeals v. Feldman,* 460 U.S. 462, 482 n.16 (1983)). South Dakota Attorney General *ex parte* at 4.

[52] South Dakota Attorney General *ex parte* at 5. South Dakota, citing *Matter of Estate of Nelson,* 330 N.W.2d 151 (S.D. 1983), argues that South Dakota law determines the scope of preclusion, including, but not limited to "issue preclusion." *Id.* In *Nelson*, the South Dakota Supreme Court determined that collateral estoppel serves as issue preclusion for all issues fully and fairly litigated in the first lawsuit." 330 N.W. 2d at 157.

[53] South Dakota Attorney General *ex parte* at 9-11.

previously addressed the legal question at issue.[54] Here, the South Dakota Circuit Court determined that Section 253(d) leaves the question of preemption under section 253 "to the exclusive jurisdiction of the Federal Communications Commission" and declined to remand that issue back to the South Dakota Commission.[55] The Circuit Court's decision was not appealed to the South Dakota Supreme Court and the South Dakota Supreme Court likewise made no determinations regarding preemption under section 253.[56] None of the decisions cited by the South Dakota Attorney General suggests that we are precluded from resolving a federal claim that a state court expressly has declined to address because, in its view, the issue falls within our exclusive jurisdiction. As to the issue of preemption under section 253, we therefore conclude that we are not bound by any prior decision of the South Dakota Supreme Court.

B. Preemption under section 253

1. Background

20. Subsection 253(a) of the Act 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."[57] Subsection 253(d) requires that the FCC preempt such statutes or requirements unless the requirement is saved by the provisions of subsection 253(b), which provides that nothing in section 253:

> shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, 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.[58]

2. Discussion

a. Federal Indian Law Issues

21. At the outset, many of the arguments that parties set forth under section 253 involve issues that have been resolved by the South Dakota courts. Petitioners argue that the

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[54] *See Town of Deerfield v. Federal Communications Comm'n*, 992 F.2d 420 (2d Cir. 1993).

[55] *Cheyenne River II* at 57-58.

[56] The Petitioners also asked that record be reopened to reflect the establishment by the Telephone Authority of a new alternative dispute mechanism and the fact that the Standing Rock Sioux Tribe issued a provisional certificate of convenience and necessity to the Telephone Authority to operate exchanges on the Standing Rock Indian Reservation. The Circuit Court denied this request as well. *Cheyenne River II* at 58–59. The Petitioners appealed the denial of this request to the South Dakota Supreme Court which affirmed the Circuit Court. *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, 595 N.W.2d 604, 614-15 (S.D. 1999). *See infra* para 17 .

[57] 47 U.S.C. § 253(a).

[58] 47 U.S.C. § 253(b).

application of section 49-31-59 discriminates against Indian tribes and tribal entities that possess tribal immunity.[59] Petitioners assert that the South Dakota Commission permitted all other sales reviewed, except one proffered by a municipality, "because it could regulate and tax the purchasers without running into problems of the effect of sovereign immunity."[60]

22. South Dakota, in contrast, contends that the Telephone Authority was not singled out for disparate treatment. It asserts that, in reality, Petitioners are reasserting an equal protection argument that Petitioners have already litigated before the South Dakota Supreme Court and that they are precluded from raising again.[61]

23. We emphasize that our decision here is limited to matters that properly fall within our authority under section 253. We do not address here issues concerning whether the South Dakota Commission's decision could, or should, be deemed to have violated federal Indian law as articulated by the United States Supreme Court. Those issues were fully litigated before, and resolved by, the South Dakota Supreme Court, and the Petitioners did not seek further judicial review of those decisions. The South Dakota Supreme Court ruled that the South Dakota Commission did not deny approval of the sale based on the Tribe's failure to waive its sovereign immunity.[62] The South Dakota Supreme Court also ruled that the South Dakota Commission's application of section 49-31-59 did not constitute a denial of equal protection under the Fourteenth Amendment of the United States Constitution.[63] We do not intend to re-litigate those issues here under the guise of exercising our authority under section 253.

b. Section 253(a)

24. The parties vigorously dispute whether the application of section 49-31-59 to the sale of the US WEST exchanges violates section 253(a) in these circumstances. The Petitioners contend that the South Dakota Commission's application of section 49-31-59 constitutes a barrier to tribal entities that seek to own and operate telephone exchanges in South Dakota.[64] The South Dakota Commission counters that section 253(a) does not apply in this instance

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[59] Joint Petition at 10.

[60] Joint Reply of the Cheyenne River Sioux Tribe Telephone Authority and US West Communications, Inc. to the Comments of the South Dakota Public Utilities Commission Opposing the Joint Petition for Preemption, CC Docket No. 98-6, March 16, 1998 (Joint Reply).

[61] South Dakota Attorney General *ex parte* at 1-2, 8-11.

[62] *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, 595 N.W.2d 604, 611-12 (S.D. 1999)(*Cheyenne River v. South Dakota*).

[63] *Id.* 614-15.

[64] Joint Petition at 8; *see also* NTCA Comments at 4; SRST Comments at 5; DOJ *ex parte* at 1-2, 5-6.

because the proposed sales would not have furthered competitive entry into the market but would simply have substituted a new provider of monopoly service.[65]

25. Although the FCC's decisions thus far provide little guidance whether subsection 253(a) would cover application of section 49-31-59, it is clear that the courts have found violations of section 253(a) in cases where competitive entry was not at issue.[66] Moreover, the Commission concluded in the *Texas Preemption Order* that "section 253(a) bars state or local requirements that restrict the means or facilities through which a party is permitted to provide service, *i.e.,* new entrants should be able to choose whether to resell incumbent LEC services, obtain incumbent LEC unbundled network elements, utilize their own facilities, or employ any combination of these three options."[67] We need not decide, however, whether section 49-31-59 falls within the scope of subsection 253(a) in this instance because, even assuming arguendo that it does, we also believe the state's application of the statute falls within the protected class of regulations covered by subsection 253(b).

c. Section 253(b)

26. Section 253(b) excludes from the scope of the FCC's preemption powers certain defined state or local requirements that are "competitively neutral," "consistent with section 254," and "necessary" to achieve the public interest objectives set forth in section 253(b).[68]

27. The parties disagree on whether application of 49-31-59 falls within the protection of section 253(b). Petitioners contend that the South Dakota Commission cannot base its denial on its inability to enforce its requirements because regulatory oversight is not necessary to achieve the public interest purposes listed in section 253(b).[69] In support, Petitioners assert that there is no dispute that the Telephone Authority in the past has safeguarded the rights of its subscribers. Petitioners also assert that the South Dakota

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[65] SDC Comments at 8-13. The South Dakota Commission also asserts that the denial of the sales makes it more likely that competition will develop in the three exchanges, because if allowed to purchase the exchanges, the Telephone Authority would enjoy the benefits of the rural protection statute contained in section 251(f), which would further stifle competition. SDC Comments at 11-12, *citing* 47 U.S.C. § 251(f). The South Dakota Commission contends section 251(f) "makes it more difficult for competitors to compete by giving rural telephone companies an automatic exemption from section 251(c) requirements and the right to ask for modifications or suspension of section 251(b) requirements."

[66] *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001).

[67] *The Public Utility Commission of Texas; The Competition Policy Institute, IntelCom Group (USA), Inc. and ICG Telecom Group, Inc., AT&T Corp., MCI Telecommunications Corporation, and MFS Communications Company, 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).

[68] *See* 47 U.S.C. § 253(b).

[69] Joint Reply at 12-13, *citing Texas Preemption Order*, paras. 83, 84; *see also* DOJ *ex parte* at 9, SRST Comments at 7-8.

Commission has found that the Telephone Authority protects the public safety and welfare, provides quality telecommunications services, and is capable of advancing universal service.[70] Petitioners contend that the South Dakota Commission's actual concern is its inability to collect taxes, which is not set forth in section 253(b) as a permissible justification for state action.[71]

28. The South Dakota Commission, in contrast, contends that its conduct is protected by section 253(b) because otherwise, it would be unable to set and enforce conditions similar to the conditions it placed upon the sixty-three approved sales or to assure the adequacy of the Telephone Authority's future services to the affected subscribers.[72] The South Dakota Commission acknowledges that one of the reasons for denying the sale involved the loss of significant tax revenues, but other reasons included the uncertainty over the recourse a customer would have to complain about service problems and unregulated rates of a monopoly provider not subject to its jurisdiction.[73] In support, South Dakota observes that the South Dakota Supreme Court affirmed the South Dakota Commission's findings that if the Telephone Authority obtained ownership of the exchanges the legal and regulatory environment created would be unfair to consumers, and deprive the South Dakota Commission of its ability to enforce conditions of sale to safeguard current and future service.[74]

29. Section 253(b) grants the States broad regulatory authority to achieve the public interest objectives set forth in a manner that is competitively neutral and consistent with section 254. The FCC has interpreted section 253(b) in a manner that is designed "to foster the overall pro-competitive, de-regulatory framework that Congress sought to establish through the [Act]."[75] Thus, the regulatory authority that section 253(b) reserves to the states, although broad, is

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[70] Joint Reply at 12, citing *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order*, Filing By Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier, No. TC 97-184 (Dec. 17, 1997) (citations omitted).

[71] Joint Reply at 15.

[72] SDC Comments at 17-18. South Dakota also questions the relevance of the Telephone Authority's statement, in its August 20 *ex parte* letter, that the "Telephone Authority is a recipient of federal assistance from the United States Department of Agriculture's Rural Utilities Services, and is subject to the provisions of Title VI of the Civil Rights Act of 1964, as amended, section 504 of the Rehabilitation Act of 1973, as amended, and the Age Discrimination Act of 1975, as amended, as well as the rules and regulations of the United States Department of Agriculture . . . ." South Dakota Attorney General *ex parte* at 16-17.

[73] SDC Comments at 14 n. 6.

[74] South Dakota Attorney General *ex parte* at 9, *citing Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S.D.*, 595 N.W.2d 604, 612 (S.D. 1999)(*Cheyenne River v. South Dakota*).

[75] *See, New England Public Communications Council Petition for Preemption Pursuant to Section 253*, CCB Pol 96-11, *Memorandum Opinion and Order*, 11 FCC Rcd 19713, 19725 (1996) (*New England Preemption Order*) at para. 25, *recon. denied, Memorandum Opinion and Order*, CCB Pol 96-11, 12 FCC Rcd 5215 (1997). In that proceeding, the Commission preempted a Connecticut Department of Public Utility Control decision that prohibited competitive entry by a class of payphone providers, finding that the state had not demonstrated methods short of prohibition, the most restrictive means available, to achieve its purpose of protecting consumers. *See New England Preemption Order* at para. 22.

nonetheless subject to preemption when it is exercised in a manner that conflicts with the pro-competitive and other goals of the Act.

30. We conclude that, under the facts presented, preemption is not warranted here. Unlike the Commission's decisions under section 253 thus far, the circumstances here involve a carrier of last resort. A state's ability to protect consumers under its regulatory authority is particularly important where consumers have only one choice of telecommunications service provider. We therefore find unpersuasive the Telephone Authority's contention that it is unnecessary for the South Dakota Commission to be able to impose and enforce its requirements. Moreover, the Telephone Authority's record of good service in the past on the five exchanges it currently owns, which, for the most part, fall within the boundary of the Cheyenne River Sioux Reservation, does not guarantee the quality of service that the Telephone Authority would provide in the future to the three different exchanges at issue here. We note that the majority of the service territory that the Telephone Authority seeks to acquire is outside the boundary of the Cheyenne River Sioux Reservation. Thus, the majority of customers to whom the Telephone Authority seeks to provide service are not members of the Cheyenne River Sioux Tribe, and many of them are not members of any Indian tribe. Thus, we are particularly cognizant of the state's interest in protecting any such consumers that do not fall within the Tribe's jurisdiction.

31. The South Dakota Commission's reasons for denying the sale of the exchanges, moreover, fall within core regulatory functions of rate regulation and other consumer protection mechanisms that are traditionally exercised by the states.[76] Even if it would have regulatory jurisdiction to perform these functions, the South Dakota Commission determined that it would be unable to enforce them.[77] As the FCC has recognized, means such as service quality requirements and legitimate enforcement actions, are generally envisioned by section 253.[78] In this instance, however, if we were to preempt, the South Dakota Commission would be unable to use such means to ensure that the transfer would be in the public interest because the South Dakota Commission would lack effective enforcement mechanisms. We find nothing in the record that undermines the South Dakota Commission's determination that the alternative

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[76] For instance, the South Dakota Commission determined that, because it would lack regulatory jurisdiction over the exchanges, it would be unable to require, as conditions for sale, that the Telephone Authority: (a) continue to offer all existing US WEST services; (b) honor all US WEST contracts and agreements; (c) not increase local rates for 18 months; and (d) obtain South Dakota Commission approval before changing any existing extended area service arrangements. The South Dakota Commission also determined that it would be unable to require the Telephone Authority to pay gross receipts taxes, to make any improvements necessary for public safety and convenience, or to provide regulatory protection to the majority of the Telephone Authority's subscribers. *See Cheyenne River v. South Dakota* at 612.

[77] *See Cheyenne River v. South Dakota* at 612.

[78] *See* S. CONF. REP. No. 230, 104th Cong., 2d Sess. 1, at 126. (Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry, such as clearly defined service quality requirements or legitimate enforcement actions).

enforcement vehicles suggested by Petitioners would be impractical.[79] We therefore find that the ability of the South Dakota Commission to enforce such reasonable conditions is an integral and necessary part of its regulatory scheme to protect the public interest as defined by the South Dakota Legislature.[80] We note that the South Dakota Commission and Petitioners engaged in settlement negotiations which ultimately were unsuccessful.[81] On its face, section 253(b) does not envision that states must relinquish effective and practical regulatory enforcement authority in order to avoid federal preemption, particularly in circumstances in which the carrier involved would be the carrier of last resort.

32. We also find that the South Dakota Commission applied 49-31-59 in a manner that is competitively neutral and consistent with section 254, as required by section 253(b). As to competitive neutrality, we find that section 49-31-59 and its application in this instance is competitively neutral, consistent with section 253(b). We have construed "competitively neutral" to require state requirements for market entry to be functionally equivalent for incumbents and new entrants.[82] As noted above, however, this case does not involve issues of competitive entry that have been the subject of the FCC's decisions under section 253 thus far.

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[79] *Cheyenne River v. South Dakota* at 611 (citing findings of the South Dakota Commission). We note that the parties also attempted to settle the issues raised by the Joint Petition. *See* Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (August 20, 1999); Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (July 19, 2000).

[80] *See City of Abilene, Texas v. Federal Communications Comm'n*, 164 F.3d 49 (D.C. Cir. 1999) (*Abilene*). In *Abilene,* the municipality argued that sections 253(b) and (c) are evidence of Congressional intent to reserve to the states only very narrow powers. The District of Columbia Circuit reached the opposite conclusion:

> Abilene points out that § 253 contains two other subsections explicitly restricting the scope of preemption and preserving State regulatory authority over telecommunications services. See 47 U.S.C. § 253 (b), (c). From this it draws the conclusion that Congress meant to reserve to the States only very narrow powers. We think the opposite conclusion follows. The two subsections--§ 253(b) and (c)—set aside a large regulatory territory for State authority. States may act to preserve and advance universal, protect the public safety and welfare, ensure the continued quality of telecommunications services, safeguard the rights of consumers, manage the public rights-of-way, and require fair and reasonable compensation from telecommunications providers for use of public rights-of-way. 164 F.3rd at 53.

[81] *See* Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (August 23, 1999); Letter from James A. Casey, Greenberg Traurig, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (March 8, 2000); Letter from Alice Walker, Greene, Myer and McElroy, Counsel for Cheyenne River Sioux Tribe Telephone Authority, to Magalie Roman Salas, Secretary, Federal Communications Commission (July 19, 2000).

[82] *See AVR, L.P. d/b/a Hyperion of Tennessee, L.P. Petition for Preemption of Tennessee Code Annotated § 65-4-201(d) and Tennessee Regulatory Authority Decision Denying Hyperion's Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, CCB Pol 98-92, *Memorandum Opinion and Order*, 14 FCC Rcd 11064, 11072, para. 16 (1999).

Nor is there any reason to believe that application of 49-31-59 affects the Telephone Authority's ability to utilize any of the competitive entry methods provided for in the Act.

33. Moreover, we find that section 49-31-59 is uniform in its language, application, and effect. The statute treats the sale of all exchanges that are subject to the South Dakota Commission's jurisdiction uniformly. Each sale is reviewed with a high degree of scrutiny applying the same factors to determine whether the sale to the prospective purchaser is in the public interest. Such scrutiny was applied equally to the proposed sale of each of the 67 US WEST-owned exchanges.[83] Neither the language of section 49-31-59 nor the application of it distinguishes as to classes of potential purchasers, a distinction we found to violate section 253(b) in the *Texas Preemption Order*.[84] Section 49-31-59 also has a uniform effect, in that it requires the Telephone Authority to adhere to the same public interest conditions as all other potential purchasers and it ensures that all consumers have the regulatory protection of the South Dakota Commission. And, as discussed above, we decline to utilize our section 253 authority as a vehicle to re-litigate issues of federal Indian law matters concerning sovereign immunity that already have been resolved by the South Dakota Supreme Court.

34. We also find that the application of section 49-31-59 is consistent with section 254, as required by section 253(b). The conditions imposed by the South Dakota Commission on their face do not conflict with the requirements of section 254. Nor does the record contain any evidence that application of 49-31-59 conflicts with section 254.[85]

35. Based upon the foregoing, we find that the instant application of section 49-31-59 is competitively neutral, consistent with section 254, and is necessary to achieve the public interest objectives enumerated in section 253(b). We therefore conclude that preemption is not required pursuant to section 253(d).

IV. GENERAL PREEMPTION ISSUE

36. Finally, Petitioners also claim that the South Dakota Commission's application of section 49-31-59 violates federal law promoting tribal sovereignty and self-government.[86] Petitioners reference various federal Indian statutes, among other things, to support their claim.[87] We do not address here issues concerning whether the South Dakota Commission's decision could, or should, be deemed to have violated these other federal laws. The South Dakota

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83 *Cheyenne River v. South Dakota* at 614; *infra* para. 18 (discussion of conditions).

84 *Texas Preemption Order* at paras. 106-107. (A limitation in the Texas regulatory scheme restricting only certain Certificate of Authority holders from providing service in rural areas violates section 253.)

85 South Dakota contends that the Commission cannot mandate the sale of the exchanges to the Telephone Authority because to do so would deprive the State of South Dakota of duties mandated to it and functions allowed to it under section 254. South Dakota Attorney General *ex parte* at 14-15.

86 Joint Petition at 13-17.

87 Joint Petition at 13-17, Appendix B at B-4 to B-9.

Supreme Court has already rejected Petitioners' preemption claim with respect to these statutes and federal policies and we see no basis for the Commission to re-litigate these issues.[88]

V. ORDERING CLAUSE

37. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 253 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 253, that the Petition for Preemption filed by the Cheyenne River Sioux Tribe Telephone Authority, and US WEST Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[88] *Cheyenne River v. South Dakota*, 595 N.W.2d 610-11.

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.

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."[89]

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.[90] 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.[91]

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).[92] The question then becomes: Was section 49-31-59 as applied necessary to promote any of the public interest goals enumerated in section

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

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

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

[92] 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).

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 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,"[93] and, consequently, that it appropriately "determined that the sales would not be in the public's best interest,"[94] 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."[95] 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.[96] 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 re-litigate that question.

[93] *Cheyenne River*, 595 N.W.2d at 612.

[94] *Id.*

[95] *Id.* at 609.

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

STATEMENT OF COMMISSIONER MICHAEL J. COPPS
CONCURRING IN PART, DISSENTING IN PART

In the Matter of: Cheyenne River Sioux Tribe Telephone Authority and US West Communications, Inc., Joint Petition for Expedited Ruling Preempting South Dakota Law

The matter before the Commission requires careful balancing of the critical issues of consumer protection and tribal sovereignty. I do not believe that the majority's decision here strikes the correct balance between the two, and thus I dissent in part from the decision of the majority.

In 1994, US WEST sought approval to sell 67 telephone exchanges in South Dakota to small local telephone companies; the South Dakota Public Utility Commission (PUC) approved the sale of 63 of these exchanges. Of the four that were not approved, three were sales to the Cheyenne River Sioux Tribe Telephone Authority (CRSTTA), a tribally owned telephone company.

The denial of these transfers by the South Dakota PUC is directly related to the fact that the CRSTTA is owned by an Indian tribe. Although the PUC did not expressly require the tribe to waive its sovereign immunity as a condition of approval of the sale, the PUC nonetheless based its denial of the transfers to the CRSTTA on its lack of enforcement and taxation authority over the tribally-owned entity. The PUC made this decision pursuant to South Dakota Codified Law § 49-31-59, which requires the PUC to look at, among other things "the payment of taxes, and the ability of the local exchange company to provide modern, state-of-the-art telecommunication services" prior to approving any transfers. While the statute on its face may be applied in a competitively neutral manner, it was not so applied here.

The Commission's authority to preempt local laws in the area of common carrier regulation is grounded in §253 (a) of the Communications Act which states that "no State or local statute…may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Section 253(b) of the Act, however, recognizes that state laws may not be preempted if they are competitively neutral and safeguard the rights of consumers. The question for the Commission therefore, is whether the statute serves as a barrier to entry and whether, if not, the statute was applied in a manner that is nonetheless competitively neutral.

Clearly, as applied by the South Dakota Public Utility Commission, the statute serves as a barrier to entry to tribally owned telephone companies. As the Commission has previously stated "[S]ection 253 expressly empowers – indeed, obligates – the Commission to remove any state or local legal mandate that 'prohibit[s] or has the effect of prohibiting' a firm from providing any interstate or intrastate telecommunications service…this provision commands us to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those state or local requirements that have the practical effect of prohibiting an entity from providing service…[that] materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced

legal and regulatory environment."[97]

Denial of the transfers of US West exchanges to the CRSTTA was not competitively neutral and not necessarily in the interests of consumers. The effect of the decision of the PUC is to prevent Indian-owned telephone companies from purchasing exchanges. This result is not competitively neutral. Further, the CRSTTA has a record of many years of good service to its customers, many but not all of whom, reside on the Cheyenne River Sioux reservation. The PUC, therefore, has no reason to believe that the CRSTTA would not provide the same quality of service to its customers in the newly acquired exchanges. Therefore, while the statute could have been applied in a manner consistent with the Act, I do not believe it has been so applied. I would preempt the application of the South Dakota statute.

To the extent that the PUC is concerned that it would not have enforcement or taxation authority over the CRSTTA it was not necessary to deny the transfer of exchange to the CRSTTA. The PUC could, as the Department of Justice noted in its comments, "enter into an agreement with a tribe concerning regulatory and taxation issues" for the purposes of the transfers at issue without infringing the sovereignty of the tribe.

I concur in the decision of the majority to the extent that the *Memorandum Opinion and Order* finds the decision of the South Dakota Supreme Court not to be preclusive. The *Order* correctly finds that the South Dakota Supreme Court did not address the authority of the Commission to preempt South Dakota law, and in fact found that issue to be subject to the exclusive jurisdiction of the Commission.

To the extent that the decision of the majority finds that the South Dakota PUC properly denied the transfer of the US West exchanges to the CRSTTA, however, I must dissent.

[97] In The Matter Of The Public Utility Commission Of Texas, City Of Abilene, Texas (1997) 13 F.C.C.R. 3460. (*citation omitted)*