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In the Matter of	)	
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Federal-State Joint Board on Universal Service	)	**CC Docket No. 96-45**
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DISSENTING STATEMENT OF

KENNETH MCCLURE, MISSOURI PUBLIC SERVICE COMMISSION
AND
LASKA SCHOENFELDER, SOUTH DAKOTA PUBLIC SERVICE COMMISSION

On Funding of Universal Service

[A Majority Opinion by the Other State Members will be Filed Later.]

April 22, 1997

DISSENTING STATEMENT OF COMMISSIONERS
KENNETH MCCLURE, MISSOURI PUBLIC SERVICE COMMISSION
AND
LASKA SCHOENFELDER, SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

April 21, 1997

We respectfully dissent from the majority's recommendation that the Commission raise funds for the Federal USF program through an assessment on both the interstate and intrastate revenues of carriers providing at least some interstate services. The Commission should only assess the interstate revenue of such carriers. This view is supported by the language of Section 254, its legislative history, Section 152(b), and relevant case law.

Set out later in this statement are the reasons demonstrating that Congress, in dividing the overall USF program between the Federal fund assessed against interstate carriers and the State funds assessed against intrastate carriers, intended to limit the FCC to assessing interstate revenues only. In short, in setting up the new USF system, Congress followed traditional telecommunications principles and gave the FCC authority over interstate issues and the States authority over intrastate issues, indicating that the FCC's authority is limited to interstate revenues.

Section 152

The majority of this Joint Board recognized in the Recommended Decision of November 8, 1996, that "[w]hile Section 254(d) prescribes that every telecommunications carrier that provides interstate communications services shall contribute to the Commission's universal service support mechanisms ... the statute does not expressly identify the assessment base for the calculation of the contribution." Recommended Decision, par. 820 (emphasis added). The crucial legal principle that the majority today has overlooked is that the lack of a plain statutory grant of authority to the FCC

to take jurisdiction over intrastate revenues in and of itself mandates that Section 254 be construed so as to deny FCC jurisdiction to assess intrastate revenues.

What the FCC believes is the best rule or most efficient means of implementing Section 254 is not relevant. With certain exceptions that are not applicable in this case, Section 152(b) of the Communications Act simply forbids the FCC from using its interpretive powers to take jurisdiction over intrastate services:

> Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier ....

47 USC § 152(b) (emphasis added).[1] In light of Section 152(b), the Commission cannot lawfully adopt rules under Section 254(d) permitting it to assess charges on intrastate telecommunications. Language in S. 652 as it passed both the House and Senate would have given the FCC such interpretive powers by adding Section 254 and neighboring provisions to the list of exceptions in the first clause of Section 152(b) quoted above. However, the Conferees deleted this language prior to the Bill's enactment as the Telecommunications Act of 1996.[2]

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[1]Any argument that considering intrastate revenues in setting a carrier's assessment does not involve a charge on intrastate revenues or otherwise implicate Section 152(b) is misleading. If the assessment goes up with every additional intrastate dollar earned, the assessment is a charge on intrastate revenue, regardless of whether assessed on a bulk or per-call basis. Further, the broad language of Section 152(b) mandates that the "sphere of state authority which the statute" protects be broad rather than constrained. People of the State of California v. F.C.C., 905 F.2d 1217, 1240-41 (9th Cir. 1990).

[2]See S. 652, 1st Sess., Section 101(c)(2) (as passed by Senate in June, 1995) and S. 652, Section 101(e)(1) (as passed by House in October, 1995, following amendment in nature of substitute). Both sought to add "part II of title II" to the exception list in Section 152(b).

The Supreme Court, in rejecting a contention very similar to that accepted today by the majority, described Section 152 as a built-in rule of statutory construction:

> While it is, no doubt, possible to find some support in the broad language of the section for [the FCC/LEC position that FCC depreciation rules apply to the intrastate as well as the interstate services of carriers subject to FCC jurisdiction], we do not find the meaning of the section so unambiguous or straightforward as to override the command of § 152(b) that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction" over intrastate service.

Louisiana Public Service Commission v. FCC, 476 US 355, 377 (1986) (emphasis in original); id. at 377, n. 5 (rule of statutory construction).[3]

A look at the statutory section at issue in Louisiana PSC, 47 U.S.C. § 220, shows that the FCC had a basis for its argument that carriers doing at least some interstate business must use FCC depreciation rules for both their interstate and intrastate plant. That the FCC nonetheless lost shows just how tough it is to establish the existence of "unambiguous or straightforward" language. As with Section 254(d), Congress in Section 220 limited the FCC's jurisdiction by type of carrier, without distinguishing between the interstate and intrastate services of carriers subject to FCC jurisdiction:

> (a) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this chapter ....

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[3]In granting a stay of the portions of the Commission's interconnection order setting pricing rules for interconnection between CLECs and LECs, the Eighth Circuit relied in large part on its finding that there were "serious doubts" that Section 251 constituted a "straightforward or unambiguous grant of intrastate pricing authority to the FCC" sufficient to displace Section 152. Iowa v. FCC, ____ F.3d ___, 1996 WL 589204, Slip Op. at 4 (Eighth Cir., Nos. 96-3453 et al., October 15, 1996).

As an example of a sufficiently clear provision, the Eighth Circuit cited Section 251(e), providing that "[t]he Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan pertaining to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction."

> (b) The Commission shall, as soon as practicable, prescribe for such carriers the classes of property for which depreciation charges may be properly included under operating expenses, and the percentages of depreciation which shall be charged with respect to each of such classes of property ....
>
> Such carriers shall not ... after the Commission has prescribed percentages of depreciation, charge with respect to any class of property a percentage of depreciation other than prescribed therefor by the Commission.

47 U.S.C. § 220 (version in effect at time of Louisiana PSC decision, emphasis added). The Supreme Court noted a number of important points supporting the FCC's reading of Section 220:

> * The command that carriers subject to FCC jurisdiction follow FCC depreciation rules was not qualified by a limitation of it to those carriers' interstate services,
>
> * There was no provision giving States authority to set depreciation rates (in fact, Congress deleted such a provision, which would have been analogous to Section 254(f), in passing the 1934 Act),
>
> * The FCC could delegate its duties to set depreciation rates to States on a case-by-case basis, but was under no obligation to do so,
>
> * The provision giving the States a right to "present their views" on depreciation to the FCC strongly implied the FCC was the decision-maker.

Louisiana PSC, 476 U.S. at 367 and 378, n. 6 (discussing sub-sections h and i and never-enacted sub-section j).

Despite all these indications (the last three of which are not present in the case of Section 254) the Supreme Court refused to find Congressional intent to override Section 152. Under Louisiana PSC, simply imposing an unqualified duty on carriers subject to the FCC's jurisdiction to obey the FCC's rules does not mean that the FCC has the right to apply these rules to such carriers' intrastate services.

Most importantly, the Court affirmed a jurisdictional separation as the means of reconciling Section 152 with FCC authority, even though in the context of depreciation this required

"depreciating one piece of property two ways", id. at 375, after splitting it into state-regulated and federal-regulated portions:

> The Communications Act not only establishes dual state and federal regulation of telephone service; it also recognizes that jurisdictional tensions may arise as a result of the fact that interstate and intrastate services are provided by a single integrated system. ... Because the separations process literally separates costs such as taxes and operating expenses between interstate and intrastate service, it facilitates the creation or recognition of distinct spheres of regulation. ... [I]t is certainly possible to apply different rates and methods of depreciation to plant once the correct allocation between interstate and intrastate use has been made.

Id. at 375. This result is fully consistent with the intent behind Section 152, which was intended by the 1934 Congress to "exempt[] the intrastate business of any carrier" from the FCC's jurisdiction.[4] While Louisiana PSC illustrates the degree to which the Supreme Court is willing to go to preserve the principle of state regulation of intrastate telecommunications, universal service separations requires only an identification of interstate revenue, and does not require the splitting of property or any other regulatory-intensive process.

Of course part of the Louisiana PSC rule is that the FCC may regulate intrastate services where jurisdictional separation is not possible -- as where separation would require a consumer to buy two phones, one for interstate and one for intrastate calls. Again, applying Section 152 in the case of universal service simply requires separating interstate from intrastate revenues. This has been done for years for purposes of comparing carriers interstate revenue to interstate costs (and intrastate revenue to intrastate costs) under the Commission's and the States' price cap and rate-of-return rules.

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[4]House Committee Report, Communications Act of 1934, Report No. 1850, 73rd Congress, 2nd Session (reprinted in Max D. Paglin, **A Legislative History of the Communications Act of 1934** (1989) at 726) (emphasis added).

It is also done in calculating carriers' payments to the Telecommunications Relay Service program, which is currently funded only by interstate revenues.[5]

For wireless carriers and other providers which do not use any separation procedure at the present time, call records should identify calling number and called numbers and so allow easy distinction between interstate and intrastate calls. There is no requirement that the separations process be done with any particular precision,[6] and it is well within the FCC's rulemaking power to accept projections based on samples of calls. Separating costs (other than perhaps payments to other carriers) would be unnecessary, as the USF assessment is on revenues. Mere "difficulty" in accomplishing separation, while grounds for assertion of FCC authority over intrastate matters prior to Louisiana PSC, is no longer reason to disregard Section 152.[7] If there are any unusual carriers which cannot identify interstate revenue in an economically feasible manner, special arrangement (such as fixed allocation factors) can be used.[8]

Finally, it cannot credibly be argued that confining the Federal USF to interstate revenues would negate the goals of Congress. Within the interstate jurisdiction, the FCC is free to use whatever assessment rate is necessary to fuel a "sufficient" support mechanism. Congress did not set

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[5]47 C.F.R. § 64.604(c)(4)(iii)(B)

[6]Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 150 (1930).

[7]See Michael J. Zpevak, **Preemption after Louisiana PSC**, 45 Fed.Com.L.J. 185, 189, 206 (1993).

[8]Some have suggested that carriers which market interstate and intrastate services to consumers in a bundled package will find it infeasible to separate their revenues. In this regard, keep in mind that bundling plans provide a way of pricing calls -- a carrier would still ordinarily keep track of where calls begin and end, regardless of the pricing category for the call. In any event, if one piece of property can be broken into a federal and a state portion for depreciation purposes, a marketing plan can as well.

a dollar target the FCC must meet for the Federal USF, or otherwise set specific goals that might make the Federal USF dependent on intrastate revenue. Instead, Congress contemplated that the States might wish to set up their own funds, to supplement the Federal USF if a State so desired. Section 152 in no way prevents Congress from getting what it sought -- a Federal fund supplemented by State funds in States desiring a higher service level than that possible with federal funding alone.[9]

Section 254

For reasons other than Section 152, we are convinced the most persuasive reading of Section 254 is that the Federal USF is limited to interstate revenue. In Conference, the House receded to the Senate on the Universal Service section of the Bill, with substantial changes, particularly on the question of jurisdiction.[10] These changes from the text of Senate Bill No. 652, as passed by the Senate, show an effort to distinguish the Federal USF from state universal service funds, and to tie the federal fund to interstate service and the state funds to intrastate services.

Senate Bill No. 652 as it passed the Senate contained only one provision as to contributions to support universal service, and treated intrastate, interstate, and foreign carriers in a unified manner:

> Every telecommunications carrier engaged in intrastate, interstate, or foreign communication shall participate, on an equitable and nondiscriminatory basis, in the specific and predictable mechanisms established by the Commission and the States to preserve and advance universal service.

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[9]The idea that intrastate funds must be included under the Federal USF because intrastate services are to be supported by the Federal USF has no legal or policy basis. Congress, and by delegation the FCC, can spend money wherever it wishes. The FCC need not be able to regulate intrastate communications for it to have the power to subsidize intrastate services. A carrier receiving an intrastate subsidy from the FCC can always refuse the money.

[10]Joint Explanatory Statement of the Committee of Conference, House Conf. Rep. No. 104-458 at 130, 104th Congress, 2nd Session.

S. 652, Section 253(c). Under the Bill, one of the principles of universal service was to be "a coordinated Federal-State universal service system ..." S. 652, Section 253(a)(6). The subsection preserving state authority did not explicitly give the States authority to assess carriers providing intrastate services, and made no distinction between interstate and intrastate matters.[11] Consistent with the approach of an all-encompassing universal service system run by the FCC, the Bill provided, without exempting carriers receiving moneys from State funds, that only "essential telecommunications carriers designated under Section 214(d) shall be eligible to receive support for the provision of universal service." S. 652, Section 253(e).

The language approved by the Conferees and enacted into law crystallized the distinction between the federal and state funds, and their sources of funding.

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. ...

47 U.S.C. § 254(d). The Conferees dropped language calling for "a coordinated Federal-State universal service system" from the list of universal service principles. See 47 U.S.C. § 254(b). Moreover, the Conferees inserted in the section on state authority the requirement that carriers providing intrastate services contribute to state funds as directed by the states, thus (a) explicitly giving States assessment authority, and (b) limiting it to intrastate carriers.

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[11] A State may adopt regulations to carry out its responsibilities under this section, or to provide for additional definitions, mechanisms, and standards to preserve and advance universal service within that State, to the extent that such regulations do not conflict with the Commission's rules to implement this section. A state may only enforce additional definitions or standards to the extent that it adopts additional specific and predictable mechanisms to support such definitions or standards.

S. 652, Section 253(d).

> A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C. § 254(f) (emphasis added). The Conferees also added language directing the States not to burden the newly distinguished "Federal" USF, and limited the requirement that carriers receiving USF funds be certified under Section 214(d) to carriers receiving Federal USF funds. See 47 U.S.C. § 254(e).

The overall effect of the Conferees' work was to take an amorphous general universal service concept and break it down into a fund controlled by the Commission and supported by interstate carriers and funds controlled by the States and supported by intrastate carriers. There would be little purpose in taking such effort to carve the Universal Service world into two spheres if the Federal USF fund was to have a first right to assess both interstate and intrastate revenues. If the Federal USF fund had such a right, any State USF fund making assessments on the same revenues would "rely on or burden" the Federal mechanism, potentially violating Section 254(f).

Moreover, if the majority were correct, it would have been unnecessary for Congress to expressly give States the duty to police against cross-subsidization of competitive intrastate services by carriers receiving USF subsidies, while giving the FCC the duty to police against cross-subsidization of competitive interstate services.[12] Drawing the line between the two types of services

[12] See 47 U.S.C. § 254(k).

is the very step the majority seeks to avoid in recommending a combined intrastate/interstate Federal USF.

The majority's interpretation of Section 254 would result in violation of the Section's requirement that carriers be assessed in a non-discriminatory and equitable manner. Because only carriers doing some interstate business are subject to the terms of Section 254(d), a carrier could completely escape the Federal USF by becoming an intrastate only carrier. Thus, a carrier with intrastate revenues of a billion dollars a year would be subject to no federal USF assessment at all, while a carrier with $999,999,999.00 of intrastate revenue and one dollar of interstate revenue would be subject to assessment for the whole billion dollars of its revenue.[13] The jurisdictionally-mixed carrier would carry a deadweight around with it as it tried to compete with the intrastate-only carrier. The majority's plan simply cannot satisfy the "competitively neutral" criteria of Section 254.

Just as there is an incentive to be an all intrastate carrier under the majority's reading, there is a reciprocal incentive to be an all-interstate carrier if States can assess the combined revenues of carriers doing some intrastate business. Escaping State USF assessments would then give the all-interstate carrier a leg up on a competitor doing some intrastate business.

Because only jurisdictionally-mixed carriers would pay into both funds, the end result of the majority's recommendation would be to create powerful and wholly artificial incentives to turn down business on the basis of its intrastate or interstate nature, to create separate subsidiaries for intrastate

[13]Under an approach limiting Federal USF assessments to interstate revenue, the later carrier would technically be subject to assessment for the Federal USF on the one dollar of interstate revenue, but would be excused under the de minimis rule of Section 254(d). Under the majority's approach, this carrier's contribution to the Federal USF from its one billion dollars of combined revenue would be substantial rather than de minimis.

and interstate business, and to take whatever steps are necessary to avoid assessment at both the Federal and State levels.

It is by no means clear that States will have the authority to assess interstate revenues to support their own funds. If they cannot, then intrastate revenue would be assessed at both the Federal and State level, while interstate revenue would be taxed only at the Federal level. This would gives a competitive edge to carriers whose business is largely interstate. While caselaw interpreting Section 152, including a landmark Supreme Court opinion, holds that interstate communications is beyond the realm of the State's authority, the Supreme Court has upheld a State sales tax on end users for interstate calls against a challenge under the Commerce Clause, -- although there apparently was no claim that the tax was illegal under the Communications Act.[14]

If the litigation over this issue is resolved in favor of state authority to charge interstate calls, and states modify state-law restrictions confining their PUCs to intrastate matters, the next issue will be the allocation of interstate revenue between states. How much of AT&T's interstate revenue would be assessable by the Mississippi USF, the Louisiana USF, the Massachusetts USF, etc.? Simply permitting both the Federal and State USF programs to assess both interstate and intrastate revenue in no way eliminates allocation difficulties.

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[14]Compare Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 148 (1930) (states have no authority over interstate rates -- interpreting predecessor Act to Communications Act); Ivy Broadcasting Co. v. AT&T, 391 F.2d 486, 491 (2nd Cir. 1968) (often cited case broadly defining prohibition under Communications Act against state regulation of interstate communications); and AT&T Communications of the Mountain States, Inc. v. Public Service Comm'n, 625 F.Supp. 1204, 1208 (D.Wyo. 1985) (PSC exceeded its jurisdiction by including interstate call in base for calculating contribution for cost of local disconnect service); with Goldberg v. Sweet, 488 U.S. 252 (1989) (upholding Illinois sales tax on interstate and intrastate calls, no discussion of Communications Act).

Conclusion

Looking at just policy issues and the text of Section 254, the best interpretation of Section 254(d) is that the Federal USF program should be funded with only interstate revenues. Moreover, it cannot be credibly claimed that Section 254(d) so unambiguously or straightforwardly mandates the opposite result as to override Section 152's rule of construction against FCC jurisdiction over intrastate telecommunications. Because the majority is recommending a position which is bad policy, which extends the FCC's jurisdiction past its limit, and what will lead to years of litigation (most likely resulting in a reversal undoing years of hard work on the part of all concerned), we must respectfully dissent from the State Joint Board members' majority recommendation on this matter.

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