SYNOPSIS OF THE SUPREME COURT'S DECISION IN *AT&T v. Iowa Utilities Board*

On January 25, 1999, the U.S. Supreme Court issued a 5-3 majority decision in *AT&T v. Iowa Utilities Board*, reversing an Eighth Circuit decision styled *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*Iowa Utilities Board*"). The Eighth Circuit had dismissed the interconnection pricing rules promulgated by the FCC in Common Carrier Docket 96-98,[1] largely on jurisdictional grounds. The Court, however, found that the Telecommunications Act of 1996 ("1996 Act") is pervasive federal legislation conferring upon the FCC broad rulemaking authority. Noting that under 47 U.S.C. §201(b), Congress granted the FCC authority to prescribe rules and regulations necessary to carry out the 1996 Act, the Court held that:

> [s]ince Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934 . . . the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions [of Sections 251 and 252]. . . . We think that the grant in section 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include Sections 251 and 252, added by the Telecommunications Act of 1996.[2]

Notably, the Court upheld the FCC's jurisdiction to implement total element long run incremental cost ("TELRIC") pricing rules. The rules require incumbent local exchange carriers to use forward-looking cost methodologies in determining the prices to charge competitors for access to pieces of their networks. The substance of the pricing rules was not addressed.

Specifically, the Court reversed the Eighth Circuit by holding that the FCC possesses authority to prevent local exchange carriers ("LECs") from separating unbundled network elements ("UNEs") before making them available to requesting competitors. The Supreme Court also reversed the Eighth Circuit's decision vacating the Commission's "pick-and-choose" rules – rules that require LECs to offer interconnection, service and network element arrangements to requesting carriers on the same terms the LEC has previously afforded other local competitors. "It is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language almost exactly," Justice Scalia opined.[3] While the Court held that the statutory language of the 1996 Act gives such authority to the FCC, the Court did not assess the substantive merits of many of the local competition rules.

The Court did, however, reach the merits on one issue, agreeing with the Eighth Circuit that the FCC's determination that operator service, directory assistance, operational support systems ("OSS") and vertical services were "network elements" was "eminently reasonable" because it fell "squarely within the statutory definition."[4] While the Court deferred to the Commission's definition of "network element" under the *Chevron* standard, the Court nevertheless determined that the FCC "did not adequately consider the 'necessary and impair' standards [of section 251(d)(2)] when it gave blanket access to the network elements, and others, in [47 CFR §51.319]."[5]

Three justices wrote opinions that accompanied the majority opinion delivered by Justice Scalia. Justice Souter concurred with the majority concerning the jurisdictional question, but was the sole justice to argue that the FCC had adequately considered the so-called "necessary and impair" standard of §251(d)(2) in providing would-be competitors access to network elements under the "pick and choose rule." Chief Justice William Rehnquist and Justice Stephen Breyer joined Justice Clarence Thomas in a partial dissent that emphasized states' rights and agreed with the lower court on the jurisdictional ques-

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1 *See In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499 (1996) [hereinafter *Local Competition Order*].

2 *See AT&T v. Iowa Utilities Bd.*, ___ U.S. ___, 1999 WL 24568, *1 (January 25, 1999), *reversing* Iowa Utilities Bd. v. FCC, 120 F3d 753 (8th Cir. 1997)(citations omitted).

3 *See AT&T v. Iowa Utilities Bd.*, 1999 WL 24568 at *14.

4 *See id.* at *10.

5 *See id.*

tion. Justice Thomas wrote, "If Congress believed, as does the majority, that section 201(b) provided the FCC with plenary authority to promulgate regulations implementing all of the 1996 Act's provisions, it presumably would not have needed to make clear that the FCC had regulatory authority with respect to particular matters."[6] Justice Stephen Breyer likewise wrote a partially dissenting opinion that agreed with the Eighth Circuit on the jurisdictional issue, noting that "The FCC's pricing rules fall outside its delegated authority because both (1) a century of regulatory history establishes state authority as the local telephone service ratemaking norm, and (2) the 1996 Act nowhere changes, or creates and exception to, that norm."[7] Justice Sandra Day O'Connor, an AT&T shareholder, recused herself from the decision.

6 *See id.* at *21.

7 *See id.* at *23.